EDITOR'S NOTE

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No. 86-98-ASX
Status: GRANTED

Title: Gregory L. Rivera, Appellant
v.
Jean Marie Minnich

Docketed:
June 18, 1986

Court: Supreme Court of Pennsylvania, Eastern District

Counsel for appellant: Campbell, William Watt

Counsel for appellee: Barton, Mary Louise

Entry	Date	Note	Proceedings and Orders
1	Jun 18 1986	G	Statement as to jurisdiction filed.
2	Aug 27 1986		DISTRIBUTED. September 29, 1986
3	Sep 11 1986	P	Response requested. (Due October 4, 1986 - NONE RECEIVED)
5	Sep 11 1986		Order extending time to file response to jurisdictional statement until October 27, 1986.
6	Oct 22 1986		Brief of appellee Jean M. Minnich in opposition filed.
7	Oct 29 1986		REDISTRIBUTED. November 14, 1986
8	Nov 17 1986		PROBABLE JURISDICTION NOTED. **********
9	Dec 31 1986		Joint appendix filed.
10	Dec 31 1986		Brief of appellant Gregory L. Rivera filed.
12	Jan 12 1987		Order extending time to file brief of appellee on the merits until February 9, 1987.
13	Feb 2 1987		Brief of appellee Jean M. Minnich filed.
14	Feb 3 1987		Record filed.
15	Feb 9 1987		Brief amicus curiae of Oregon filed.
16	Feb 6 1987		SET FOR ARGUMENT. Wednesday, March 25, 1987. (4th case)
17	Feb 10 1987		CIRCULATED.
18	Feb 9 1987	X	Brief amicus curiae of California, et al. filed.
19	Feb 11 1987	D	Motion of Oregon for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Feb 23 1987		Motion of Oregon for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
21	Mar 25 1987		ARGUED.

86-98 (1)

No.

Term, 1986

IN THE SUPREME COURT OF THE UNITED STATES

JEAN MARIE MINNICH,
Appellee

vs.

GREGORY L. RIVERA,
Appellant

On Appeal from the Supreme Court of Pennsylvania

Jurisdictional Statement

William Watt Campbell
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53 North Duke Street
Lancaster, PA 17602

James R. Adams
126 East King Street
Lancaster, PA 17602

Counsel of Record

96pp

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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1986

No.

JEAN MARIE MINNICH,
Appellee

vs.

GREGORY L. RIVERA,
Appellant

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Gregory L. Rivera, Appellant herein, appeals from the judgment of the Supreme Court of Pennsylvania entered in the above titled case on March 21, 1986 and hereby files a jurisdictional statement in support thereof. A time stamped copy of the Notice of Appeal is attached hereto as Appendix "A".

Question Presented

Does a state statute permitting issues in a paternity action to be determined only by a preponderance of the evidence violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

Opinions Below

The Court of Common Pleas of Lancaster County, Pennsylvania issued an order and opinion on October 19, 1984, finding The Pennsylvania Support Law, 42 Pa.C.S. §6704(d) (formerly Section 6704(g)), to be violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, by providing that in paternity cases "The burden of proof shall be by a preponderance of the evidence." Petitioner was granted a new trial. This Opinion

is reported at 69 Lancaster Law Review 329 and a copy is attached hereto as Appendix "B".

Upon direct appeal, the Supreme Court of Pennsylvania entered an Order with Opinion finding the statute to be constitutional. The lower court's grant of a new trial was reversed. This opinion is reported at _____ Pa. _____, 506 A.2d 879 (1986), and a copy is attached hereto as Appendix "C".

Jurisdiction

The Order of the Supreme Court of Pennsylvania was entered March 21, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).

Statute and Constitutional Provision Involved

> "Where the paternity of a child born out of wedlock is disputed, the determination of

paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not a trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. The burden of proof shall be by a preponderance of the evidence." 42 Pa.C.S. Section 6704(d).

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Fourteenth Amendment, Constitution of the United States.

Statement of the Case

Petitioner is the defendant in a child support case commenced June 17, 1983, by Jean Marie Minnich. Defendant denied paternity and trial was held before a jury on April 24, 1984. On April 13, 1984, Defendant filed a petition asking the court to declare that the burden of proof set by Pennsylvania statute in paternity actions violated Defendant's Due Process rights under the federal

Constitution. A copy of the Petition is attached hereto as Appendix "D."

The court issued a Rule against Plaintiff to show cause why the burden of proof should not be set at proof by clear and convincing evidence. Plaintiff filed an answer in opposition to the Rule. The trial court then reserved its ruling on the burden of proof issue. At the close of testimony, Defendant's petition was denied. The jury found in favor of Plaintiff.

Defendant filed a motion for new trial alleging, in part, that it was error for the court to have denied Defendant's petition seeking a declaration that the burden of proof by a preponderance of the evidence violated his Due Process rights under the federal Constitution. A

copy of the Motion for New Trial is attached hereto as Appendix "E".

On October 19, 1984 Defendant's motion for a new trial was granted on the ground that 42 Pa. C.S. § 6704(d) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because the constitutional provision requires that the burden of proof at a paternity trial be at least proof by clear and convincing evidence. As the Pennsylvania statute sets a lower burden of proof, it was found to be unconstitutional.

Federal Questions Are Substantial

The Supreme Court of Pennsylvania ruled here that a portion of the Pennsylvania Judicial Code, 42 Pa.C.S. §6704(d) (Supp. 1985), providing that in a paternity trial the "burden of proof shall be a preponderance of the

evidence," does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court has recognized the substantial constitutional protection accorded familial bonds.

> "The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interests threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. See Stanley v. Illinois, 405 U.S. 645, 651-652, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972). Just as the termination of such bonds demands procedural fairness, see Lassiter v. Department of Social Services, 452 U.S. 18, 68 L.Ed. 2d 640, 101 S.Ct. 2153 (1981), so too does their imposition. Through the judicial process, the State properly endeavors to

> identify the father of a child born out of wedlock and to make him responsible for the child's maintenance. Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination." Little v. Streater, 452 U.S. 1, 13, 68 L.Ed.2d 627, 101 S.Ct. 2202 (1981).

The instant case involves the involuntary creation of a parent-child relationship.

The issue in Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982), was the burden of proof where parental rights were to be terminated. Mr. Justice Blackmun, speaking for the Court, noted "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Id., 455 U.S. at 753.

States may set burdens of proof, but only within the requirements of Due Process.

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" Addington v. Texas, 441 U.S. 418, 423, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).

A constitutional deficiency in a burden of proof cannot be remedied by other procedural rights, such as counsel or blood tests. Santosky v. Kramer, supra, 455 U.S. at 757.

In a paternity action in Pennsylvania, the plaintiff is represented by the District Attorney, 42 Pa.C.S. §6711. Counsel is also provided to indigent defendants. Corra v. Coll, 305 Pa. Super. 179,

459 A.2d 480 (1982). Substantial federal aid is made available to the states to pursue claims for child support on behalf of mother and child. See Little v. Streater, supra, 452 U.S. at 15. Beyond counsel and blood tests, however, there is no funding mechanism to protect the putative father's familial and liberty interests.

The impact of the paternity trial is both permanent and substantial. A determination of paternity is final and may not be relitigated. Upon a finding of paternity and the entry of a support order, if the defendant willfully fails to comply, he may face imprisonment. 18 Pa.C.S. §4324. His wages, salary or other earnings may be attached. Pa.R.Civ.P. 1910.22.

If the child was born out of wedlock, a determination of paternity may give the child rights to the defendant's estate, 20 P.S. §§2107(d), 2514(8), 3538, and 6114(5), and to his Workmen's Compensation benefits, 77 P.S. §562.

The involuntary creation of a parent-child relationship is no less important in constitutional terms than the involuntary termination thereof.

This case presents the mirror image of Santosky v. Kramer, supra. Santosky v. Kramer examined the three factors in Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976): "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing

governmental interest supporting use of the challenged procedure." Santosky, 455 U.S. at 754. Santosky had been brought by the state of New York against the parents of a child. In our case, the Plaintiff is the mother, backed by the resources of the state. This Court noted in Little v. Streater, supra, 452 U.S. at 13, that the state is in fact standing behind the plaintiff in a paternity action.

Regarding the first of the three factors, Mr. Justice Blackmun specifically found the private interest in parental rights termination cases to be "commanding." Santosky, supra, 455 U.S. at 758.

Second, Mr. Justice Blackmun found a substantial risk of erroneous results from the use of the

preponderance standard. Id. Because of the resources of the state, arrayed on behalf of one party, and because of the kind of evidence involved, the evidence as to involuntary termination is "unusually open to the subjective values of the judge." Santosky, supra, 455 U.S. at 762.

There is a similar substantial risk of erroneous decision making under the Pennsylvania statute. The resources of the state are again arrayed on behalf of the Plaintiff. The nature of the evidence gives rise to a substantial risk of erroneous decision making. As to blood tests, "the proper evidentiary weight to be given [blood tests] is still a matter of academic dispute." Mills v. Habluetzel, 456 U.S. 91, 98 n.4, 71

L.Ed.2d 770, 102 S.Ct. 1549 (1982). As to the conventional evidence, in Little v. Streater, supra, Mr. Chief Justice Burger cited with approval an earlier opinion of Mr. Justice Brennan, while he was a member of the New Jersey Superior Court:

> "[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity." Little v. Streater, supra, 452 U.S. at 8.

As to the third Mathews factor, the governmental interest in use of the challenged procedure, Santosky v. Kramer notes that the government only has an interest in a correct determination. "[A] stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." Santosky, supra, 455 U.S. at 76. In our case,

although it has provided substantial resources to the child and the mother to establish paternity, the state still has an interest only in a correct determination. As imposition of a higher standard of proof would impose no additional financial or administrative burden, the state has no legitimate ground to oppose a higher burden of proof.

Conclusion

The result in Santosky v. Kramer was that parental rights could no longer be terminated, except by clear and convincing evidence. There is no constitutionally significant difference between the involuntary termination and the involuntary creation of a parental-child relationship. Therefore, it is submitted that a substantial federal

question exists in this case which should be considered by this Court.

Respectfully submitted,

William Watt Campbell

William Watt Campbell
James R. Adams
Counsel for Appellant

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JEAN MARIE MINNICH, Appellant	:	No. 161 E.D.
vs.	:	
GREGORY L. RIVERA, Appellee	:	Appeal Docket 1984

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Gregory L. Rivera, the Appellee above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania reversing the Order of the Court of Common Pleas of Lancaster County entered in this proceeding on March 21, 1986.

This appeal is taken pursuant to Title 28, United States Code, Section

Appendix "A"

1257, subparagraph (2).

WILLIAM WATT CAMPBELL
Attorney for Appellee
53 North Duke Street
Suite 305
Lancaster, PA 17602

DATE: April 17, 1986

CERTIFICATE OF SERVICE

I, William Watt Campbell, a member of the Bar of the Supreme Court of the United States and counsel of record for Gregory L. Rivera, Appellee herein, hereby certify that on April 17, 1986, pursuant to Rule 10.4 and 28.5, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal on each of the parties required to be served herein, as follows:

On April 17, 1986 I served Jean Marie Minnich, the Appellant herein, by mailing the copy in a duly addressed envelope, with first class postage pre-paid, to Mary L. Barton, counsel of record for said Jean Marie Minnich at her office at Office of the District Attorney, 50 North Duke Street,

Lancaster, PA 17602.

All parties required to be served have been served.

WILLIAM WATT CAMPBELL

Subscribed and sworn to
before me this 17th day
of April, 1986.

NOTARY PUBLIC

SANDRA K. GRAVER, Notary Public
Quarryville, Lancaster Co., Pa.
My Commission Expires March 2, 1987

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS DIVISION

JEAN MARIE MINNICH :
: No. 1435 of 1983
vs. :
: Paternity
GREGORY L. RIVERA :

BEFORE MUELLER, J., HUMMER, J. and PEREZOUS, J.

O P I N I O N

BY MUELLER, J.

Presently before the Court is the motion for new trial filed by Defendant, Gregory L. Rivera.

On June 17, 1983, Plaintiff, Jean Marie Minnich, filed a Complaint seeking support for Cory Michael Minnich from Defendant, Gregory L. Rivera, the alleged father of her son. Defendant

denied paternity, and a trial was held before a jury on April 24, 1984. The jury found in favor of Plaintiff and determined that Defendant is the father of Cory Michael Minnich. Post-trial motions were filed on May 3, 1984. Briefs having been filed by both parties and oral argument having been heard by the Court en banc on September 26, 1984, these motions are properly before the Court for disposition.[1]

During the trial, Plaintiff claimed that she had sexual relations with Defendant on two or three occasions, but

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[1]Defendant's attorney gave notice to the Attorney General of Pennsylvania pursuant to Pa. R.C.P. 235, and no appearance was entered by the Attorney General. See: Letter

the testimony described only one incident which occurred in the late summer of 1982. This episode took place in the back of a parked van with Defendant's brother, Christopher Rivera, and Plaintiff's sister, Mary Minnich, also present in the van. (N.T. 24, 31-32). Plaintiff denied engaging in sexual relations with anyone other than Defendant during the possible conception period of the child, who was born on May 28, 1983. (N.T. 25).

Defendant first argues that

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dated May 22, 1984 attached to Defendant's attorney's affidavit of service filed August 9, 1984.

Christopher Rivera, Defendant's brother, should have been presented to the jury standing beside Plaintiff and her child after a foundation had been laid as to Christopher being the possible father of the child. This foundation according to Defendant consisted of testimony by Christopher Rivera that he violated an Order of this Court dated April 16, 1984 by refusing to submit to HLA blood tests and Defendant's testimony that Plaintiff wanted to have sexual intercourse with Christopher and that she was alone with him in the back of the van for a short period of time. (N.T. 51, 52, 59-61).[2]

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[2]After the pretrial conference held April 12, 1984, Defendant's attorney filed a supplemental pretrial

In his testimony, Defendant admitted having sexual relations with Plaintiff on the night in question, and also stated that no one else had sex with Plaintiff. Defendant did testify that at one point Christopher and Plaintiff were alone in the back of the van for approximately five to ten minutes. Defendant acknowledged that he could not definitely say that the two of them had

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memorandum on April 13, 1984 listing two additional witnesses. This memorandum stated: "A. Chris Rivera, brother of Gregory Rivera, will testify that he had sexual relations with the Plaintiff on the same night in which Gregory Rivera had sex with her."

engaged in sexual intercourse. (N.T. 59-61). Plaintiff denied sexual relations with anyone other than Defendant during the relevant period of conception, and she specifically denied having sex with Christopher on the same night she had sex with Defendant. (N.T. 32-33). Plaintiff's sister, Mary Minnich, who was also present in the van that night, stated that nothing occurred between Plaintiff and Defendant's brother in the back of the van. (N.T. 45).

Defendant claims he was harmed because the jury was prevented from considering relevant and material evidence in the form of Christopher

Rivera standing beside Plaintiff and her child. The Court disagrees. A proper foundation for the introduction of this evidence was not established. No witness, including Defendant himself, offer any testimony that Plaintiff had engaged in sexual intercourse with Christopher Rivera. In view of this, the Court properly excluded the presentation of this evidence to the jury.

Defendant next contends that the jury should have been instructed as to the legal effect of a determination by them that Christopher Rivera and Plaintiff had indeed engaged in sexual intercourse during the time of possible

conception. Defendant asserts that sufficient evidence, even without the presentation to the jury of Christopher beside Plaintiff and her child, existed to allow the jury to consider whether Plaintiff had sexual relations with Christopher Rivera.

The Court finds this argument totally devoid of merit. As discussed earlier, no evidence was presented at trial from which the jury could conclude that Plaintiff had sex with anyone other than Defendant. Accordingly, it was not error for the Court to refuse Defendant's request for a charge to the jury concerning the legal effect of Plaintiff having had sexual relations

with anyone other than Defendant.

The procedure governing the commencement of support actions in Pennsylvania is set forth at 42 Pa. C.S.A. §6704.[3] Section 6704(g) states that at a trial for paternity "[t]he burden of proof shall be by a preponderance of the evidence." At the close of the testimony at the trial, Defendant's request that the burden of proof be set at a "clear and convincing evidence" standard was denied.

Defendant's final argument is that the due process requirements of both the

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[3]Act of April 28, 1978, P.L. 202, No. 53, §10(88), as amended, Act of October 5, 1980, P.L. 693, No. 42, §207(a). Subsections (a) to (d) of 42 Pa. C.S.A. §6704, insofar as they

United States Constitution and the Pennsylvania Constitution mandate that a determination of paternity be made using a clear and convincing standard of proof, rather than a mere preponderance of the evidence standard.

The analysis of Defendant's argument must begin with the strong presumption of constitutionality of an Act of the General Assembly and the heavy burden of persuasion upon one who challenges the constitutionality of a statute. Snider v. Thornburgh, 496 Pa. 159, 166 (1981).

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apply to the practice and procedure in an action for support, have been superceded. Pa. R.C.P. 1910.31(4).

As such, unless a legislative enactment "clearly, palpably and plainly" violates the constitution, it will not be declared unconstitutional. Snider, supra; Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 16 (1975); Daly v. Hemphill, 411 Pa. 263, 271 (1963).

The Fourteenth Amendment to the United States Constitution provides, in part, that "[n]o state shall . . . deprive any person of life, liberty or property, without due process of law."[4] Due process is not a static, rigid

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[4]Although Defendant's brief raises a due process claim under the Pennsylvania Constitution, it appears to rely only on the Federal Constitution. Accordingly, the

concept, but is flexible and calls for such procedural protections as the situation warrants to ensure fundamental fairness. Morrissey v. Brewer, 408 U.S. 471 (1972).

This is a case of first impression in this Commonwealth, so this Court is without guidance in determining whether due process is violated when an adjudication of paternity is made using a preponderance of the evidence standard of proof as stated in the statute. This Court believes that the creation of a

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Court's analysis of the burden of proof issue presented will focus on federal law only.

parent-child relationship is an example of the kind of situation which warrants a flexible application of due process.

In Pennsylvania, paternity actions were once governed by criminal law.[5] A defendant contesting paternity had the choice of proceeding in a civil action using a preponderance of the evidence standard or proceeding in a criminal action employing a beyond a reasonable doubt standard.[6] This choice was

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[5] See: Wilful separation or non-support, 18 P.S. §4731, Act of June 24, 1939, P.L. 872, §731, Act of July 5, 1957, P.L. 481, §1; Neglect to support a bastard, 18 Pa. C.S.A. §4323, Act of December 6, 1972, P.L. No. 1482, No. 334, §1.

[6] Act of July 13, 1953, P.L. 431, as amended, Act of August 14, 1963, P.L. 872, 62 P.S. §2043.31 et seq.

removed, however, when the Pennsylvania Legislature decided that all determinations of paternity would be civil actions and the burden of proof would be by a preponderance of the evidence. 42 Pa. C.S.A. §6704(g). The civil/criminal distinction is of no importance in determining what standard of proof is constitutionally required. That distinction has been discarded, and the focus is now on the nature of the threatened deprivation. See: In re

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See: Commonwealth ex rel. Johnson v. Peake, 272 Pa. Super. 340 (1979); Armstrong v. Dandridge, 257 Pa. Super. 415, Commonwealth v. Dillworth, 431 Pa. 479 (1968).

Gault, 387 U.S. 1 (1967).

Resolution of the issue of whether the preponderance of the evidence standard of proof in a paternity action is constitutionally sufficient requires analysis of the governmental and private interests affected in this adjudication. In Mathews v. Eldridge, 424 U.S. 319 (1976), the United States Supreme Court outlined three distinct factors to be balanced when identifying the specific requirements of due process. These factors are:

> " . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including

> the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." 424 U.S. at 335.

The first factor - the private interests of a defendant in a paternity action - weighs heavily in favor of the higher standard of proof of clear and convincing evidence. Clearly, a defendant's familial interests are affected by a paternity determination. A parent's right to "the companionship, care, custody and management of his or her children" has been held to be an important protectible interest. Lassiter v. Dept. of Social Services, 452 U.S. 18, 27 (1981), quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Because that interest is so substantial, the Supreme Court in Lassiter held that "a parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one". Lassiter, 452 U.S. at 27.

The creation of a parent-child relationship involves important and protectible familial interests just as the termination of a parent-child relationship does. The imposition of parental obligations demands procedural fairness. The United States Supreme Court recognized this in Little v. Streater, 452 U.S. 1 (1981), when it held that due process requires that a

state must provide indigent putative fathers with blood tests where the statute required that the costs of such tests be charged against the requesting party. The protectible interests of the putative father in a paternity action were also acknowledged by the Pennsylvania Superior Court when it held in Corra v. Coll, 305 Pa. Super. 179 (1982), that indigent defendants in a civil paternity action have a due process right to appointed counsel.

A putative father contesting paternity also has significant liberty interests at stake. Once paternity is established res judicata applies, and this finding cannot be relitigated.

Norris v. Beck, 282 Pa. Super. 420 (1980). A putative father's physical liberty may also be in jeopardy. If paternity is established and a support order is entered, a defendant who wilfully refuses to comply with this order, when he has the financial resources to do so, faces possible incarceration. 18 Pa. C.S.A. §4324 (up to 90 days imprisonment).

In addition, a defendant found to be a father has property interests that will be affected. The wages, salary or commissions of a person owing support may be attached. Pa. R.C.P. 1910.22. Children born out of wedlock may have rights to their natural father's estate,

20 P.S. §§2107(d), 2514(8), 3538, 6114(5), and to his worker's compensation benefits, 77 P.S. §562.

These familial, liberty and property interests of a defendant in a civil paternity action are significant enough that they alone justify imposing a clear and convincing standard of proof. The Court still must evaluate the remaining two Mathews elements, however, to determine whether they shift the due process balance away from granting putative fathers this additional protection.

The next factor to be considered is the risk that a paternity adjudication with a burden of proof of by a

preponderance of the evidence will lead to an erroneous determination of paternity. In paternity hearings, numerous factors combine to increase the risk of erroneous factfinding. In these trials, the testimony of a party is often of questionable reliability, and there are seldom accurate or reliable eyewitnesses. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and may reduce the chance that an erroneous determination of paternity will occur. See: Addington v. Texas, 441 U.S. 418 (1979). In Little, supra, the Supreme Court found that access to blood tests by indigent putative fathers

would help ensure that a correct decision would be reached. More recently, the Pennsylvania Superior Court in Corra, supra, found that access to blood tests was not enough protection against erroneous determinations and decided that counsel is needed to ensure that the defendant is informed of his right to request blood tests and to inform him of their significance. To require a clear and convincing standard of proof is even a better procedure for safeguarding against erroneous determinations of paternity.

Additional support for increasing the standard of proof applicable to paternity hearings can be found in other

Pennsylvania statutory and decisional law. For example, for purposes of prescribing benefits for children born out of wedlock through their father, clear and convincing proof is required that the man was the father of the child. 48 P.S. §167(b)(3). Similarly, in order for a child born out of wedlock to have rights in his father's estate, there must be clear and convincing evidence of the father's paternity. 20 Pa. C.S.A. §2107(c)(3). In both of these situations, a prior court determination of paternity is sufficient to meet the clear and convincing standard. The resulting anomaly is that a paternity adjudication where the

standard of proof was only by the preponderance of the evidence can then be used to satisfy the higher standard of proof necessary for proving paternity in these situations.

The clear and convincing standard of proof is employed in many different types of civil actions in Pennsylvania. Clear and convincing evidence is required to prove, among other things: title by adverse possession, Stevenson v. Stine, 412 Pa. 478 (1963); a claim for wages for personal service to a decedent, Mooney's Estate, 328 Pa. 273 (1937); fraud, Gilberti v. Coraopolis Trust Company, 342 Pa. 161 (1941); and facts necessary to overcome the

presumption of a gift, Butler v. Butler, 464 Pa. 522 (1975).

The Supreme Court in Santosky v. Kramer, 455 U.S. 745 (1982), reviewed New York's procedure for termination of parental rights and held that the preponderance of the evidence test violated due process. The Supreme Court stated that the intermediate standard of proof of clear and convincing evidence is mandated when the individual interests at stake are both "particularly important" and "more substantial than mere loss of money". 455 U.S. at 756. This Court believes that an adjudication of paternity is a situation demanding this intermediate

standard of proof.

The final consideration is the government interest involved in a paternity action and the administrative and fiscal burdens a higher burden of proof would entail. The primary interest of the state is that a just and accurate decision be reached. Lassiter, supra, 452 U.S. at 27. Therefore, not only the putative father's interest but also the state's interest is best served when the determination of paternity is made under a clear and convincing standard, rather than by a mere preponderance of the evidence. Since an accurate determination of paternity increases the likelihood that the

adjudged father will comply with his support obligations, the state's future administrative burdens will be lessened. The state will incur no added expense by the imposition of the higher standard of proof at a paternity hearing; unlike, for example, a constitutional requirement of court-appointed counsel.

Our conclusion is that in paternity determination proceedings, the private interests affected are substantial; the risk of error from using a preponderance of the evidence standard is considerable; and the countervailing state interest favoring that standard is minimal. Accordingly, the Court finds that due process requires that the

burden of proof at a paternity trial be by clear and convincing evidence and that Section 6704(g) is unconstitutional by requiring the burden of proof to be by a preponderance of the evidence.

O R D E R

AND NOW, October 19, 1984, Defendant's Motion for a New Trial is granted. The Domestic Relations Office is directed to send a copy of this Opinion and Order to LeRoy S. Zimmerman, Attorney General of Pennsylvania, 16th Floor, Strawberry Square, Harrisburg,

Pennsylvania 17120.

BY THE COURT:

PAUL A. MUELLER, JR.
JUDGE

Copies to:
Mary Louise Barton, Assistant
District Attorney
William Watt Campbell, Esquire

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

JEAN MARIE MINNICH, Appellant	:	
	:	No. 161 E.D. Appeal Docket, 1984
vs.	:	
GREGORY L. RIVERA, Appellee	:	
	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the ORDER of the COURT of COMMON PLEAS, of LANCASTER COUNTY, be and the same is hereby REVERSED and this case is REMANDED for proceedings consistent with this opinion.

BY THE COURT:

_____

Marlene F. Lachman, Esq.
Prothonotary

Dated: MARCH 21, 1986

Appendix "C"

[J-151-1985]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JEAN MARIE MINNICH,	:	No. 161 E.D.
	:	Appeal Docket 1984
Appellant	:	
	:	Appeal from
v.	:	Judgment of the
	:	Court of Common
GREGORY L. RIVERA,	:	Pleas of Lancaster
	:	County,
Appellee	:	Pennsylvania,
	:	Domestic Relations
	:	Division
	:	No. 1435 of 1983
	:	
	:	ARGUED: OCTOBER
	:	22, 1985

OPINION OF THE COURT

JUSTICE ROLF LARSEN FILED: MARCH 21, 1985

The issue presented in this appeal is whether the evidentiary standard in a paternity trial, proof by a preponderance of the evidence, as prescribed by statute, 42 Pa.C.S.A. § 6704(d), violates the due process clause of the 14th Amendment of the United States Constitution.

The Act of April 28, 1978, P.L. 202, No. 53, as amended by the Act of October 5, 1980, P.L. 693, No. 42, as further amended by the Act of December 20, 1982, P.L. 1409, No. 326, 42 Pa.C.S.A. § 6704 abolished criminal paternity proceedings and the evidentiary burden of proof beyond a reasonable doubt.[1] Instead the legislature mandated that the trial of paternity shall be a civil action with the lessened standard of proof generally

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[1]Previously, the procedure to establish paternity was by a criminal bastardy prosecution. In such a proceeding the Commonwealth prosecuted

applicable to civil trials--proof by a preponderance of the evidence. Section 6704(d) provides:

> Trial of Paternity - Where the paternity of a child, born out of wedlock is disputed, the determination of paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not a trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. The burden of proof shall be by a preponderance of the evidence. (Emphasis supplied).

42 Pa.C.S.A § 6704(d).

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the alleged father upon the complaint of the mother. The Commonwealth's burden was to prove beyond a reasonable doubt an act of intercourse between the prosecutrix-mother and the putative father, and the conception of a child as a result of that act. See Commonwealth v. Rankin, 226 Pa. Super 37, 311 A.2d 660 (1973).

On May 28, 1983, the appellant, Jean Marie Minnich, gave birth to a baby boy, Cory Michael Minnich. Approximately three weeks later, on June 17, 1983, appellant filed a complaint in the domestic relations division of the Common Pleas Court of Lancaster County seeking support for her son from the appellee, Gregory L. Rivera, alleged to be the father of the newly born infant. Appellee denied paternity and a trial on that issue was held before a jury on April 24, 1984. The jury returned a verdict in favor of appellant and against appellee finding that the appellee, Gregory L. Rivera, was the father of Cory Michael Minnich.

Prior to the start of the trial, the appellee moved the court that the burden of proof as set forth in 42 Pa.C.S.A. 6704(d) -- proof by a preponderance of the evidence -- offends the due process clause of the 14th Amendment to the United States Constitution.[2] Appellee argued that due process requires that the burden of proof in paternity cases be proof by clear and convincing evidence. He requested that the jury be so charged. The trial judge denied appellee's motion and refused to charge on the heightened burden of proof. The court instructed the jury in accordance

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[2]The lower court noted that although the appellee, in his brief, raised a due process issue under the Pennsylvania Constitution, in his argument he

with 42 Pa.C.S.A. § 6704(d) that the burden of proof in establishing paternity is proof by a preponderance of the evidence.

Following the verdict against him, the appellee filed post-trial motions arguing that the trial court had erred in refusing to impose the clear and

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appeared to rely exclusively on the Federal Constitution. Hence, the lower court's decision focused on the 14th Amendment. Similarly, in this Court, the appellee's brief raises a claim under Article I, Section 1 of the Pennsylvania Constitution but the arguments of both parties concentrate on the Federal Constitution. Accordingly, we have focused our analysis on 14th Amendment requirements. Nevertheless, what we say here is equally applicable to due process concerns of the Pennsylvania Constitution.

convincing evidence standard to the issue of paternity and in charging the jury on the preponderance standard. The lower court reversed itself holding that due process requires that the burden of proof in a paternity case be by clear and convincing evidence. The court held that 42 Pa.C.S.A. 6704(d) requiring only proof by a preponderance of the evidence is unconstitutional and ordered a new trial. From the lower court's holding and order, this appeal followed.[3]

At the outset, we begin our consideration of the issue here with the strong presumption that enactments of

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[3]This is a direct appeal to this court under 42 Pa.C.S.A. § 722(7) which provides:

the legislature are constitutional and he who challenges the constitutionality of an act of assembly carries a heavy burden of proof. Commonwealth v. Mikulan, ____ Pa. ____, 470 A.2d 1339 (1983). Snider v. Thornburgh, 496 Pa.

> The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases:
>
> (7) Matters where the court of common pleas had held invalid as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any statute of, this Commonwealth, or any provision of any home rule charter.

159, 436 A.2d 593 (1981). National Wood Preserves v. Commonwealth, 489 Pa. 221, ____ A.2d ____ (1980).

> "It is an elementary principle of statutory construction, which this Court has affirmed on numerous occasions, that 'an Act may not be declared unconstitutional unless it violates the constitution clearly, palpably, plainly and in such manner as to leave no doubt or hesitation in our minds.'" (citation omitted)

Absentee Ballots Case No. 1, 431 Pa. 165, 169, ____ A.2d ____, ____ (1968).

The statute in question here -- 42 Pa.C.S.A. § 6704(d) --mandates that paternity trials be civil proceedings as opposed to criminal, and the burden of proof be the standard usually applied to civil trials -- proof by a preponderance of the evidence. It is within the

province of the legislature to prescribe a standard of proof applicable to particular actions and proceedings so long as the standard announced meets minimum due process requirements. See: Commonwealth v. Wright, ____ Pa. ____, ____ A.2d ____ (1985). The appellant argues that the lower court erred in declaring that the preponderance standard set by the legislature failed to meet minimum due process requirements and was, therefore, unconstitutional. We agree with appellant that the lower court did err and now reverse.

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of

> factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk or error between the litigants and to indicate the relative importance attached to the ultimate decision.

Commonwealth v. Wright, ____ Pa. ____, ____ A.2d ____ (concurring opinion by Larsen, J.) in which the majority joins, citing Addington v. Texas, 441 U.S. 418, 423 (1979).

In weighing the standard of proof that should apply in paternity trials, it is incumbent upon us to: (1) appraise the interest of the individual alleged to be the father along with the interests of the child and the mother; (2) assess the Commonwealth's interest

in family matters and in establishing paternity under a particular standard of proof; and (3) consider the risk that those interests may be erroneously deprived because of the standard applied. See Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). Also see Stantosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982).

The person alleged to be father has a legitimate interest in not being declared the father of a child he had no hand in bringing into the world. It is important to him that he not be required to provide support and direct financial assistance to one not his child. There is a legitimate concern on his part with

not having a stranger declared his legal heir thereby giving that stranger potential interests, inter alia, in his estate,[4] and Social Security Benefits.[5] He has an interest in not being responsible for the health, welfare and education of a child not his own.

The child born out of wedlock, on the other hand, has an interest in knowing his father and in having two parents to provide and care for him. The child's concerns include a known belonging to a certain line of descent

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[4]See Probate, Estates and Fiduciaries Code, 20 Pa.C.S.A. § 2101, et seq.

[5]See 42 U.S.C. § 402.

with knowledge of any benefits or detriments inheritable from that line. Further, the child is entitled to financial assistance from each parent able to provide such support.

The mother has an interest in receiving from the child's natural father help, financial and otherwise, in raising and caring for the child born out of wedlock. She has an interest in seeing that her child has two responsible parents.

The Commonwealth has an interest in its infant citizens having two parents to provide and care for them. There is a legitimate interest in not furnishing financial assistance for children who

have a father capable of support. The Commonwealth is concerned in having a father responsible for a child born out of wedlock. This not only tends to reduce the welfare burden by keeping minor children, who have a financially able parent, off the rolls, but it also provides an identifiable father from whom potential recovery may be had of welfare payments which are paid to support the child born out of wedlock.

Considering the respective interests of the parties, the burden of proof by a preponderance of the evidence which requires the litigants to share the risk of error in "roughly equal fashion," Addington v. Texas, supra at 423,

satisfies the minimum requirements of due process. In the typical case, the alleged father has had sexual relations with the mother and it is the mother's contention that those relations resulted in conception and the birth of a child. The putative father denies paternity and demands a trial to determine that issue. The trial must be procedurally fair, and to that end the Commonwealth must provide indigent putative fathers with blood tests without charge, Little v. Streater, 452 U.S. 1 (1981), and alleged fathers who are indigent have a right to appointed counsel in paternity actions, Corra v. Coll, 305 Pa.Super 179, ____ A.2d ____ (1979). These procedural

safeguards work to keep the risk of error between the litigants on a close to even footing.

Generally, those cases where clear and convincing evidence is the standard of proof, the moving party is seeking: (A) to diminish or terminate another's rights: In Re T.R., a minor, Appeal of P.A.R., ____ Pa. ____, 465 A.2d 642 (1983); Santosky v. Kramer, supra (involuntary termination of parental rights); Stevenson v. Stein, 412 Pa. 478, ____ A.2d ____ (1963)(title by adverse possession); Woodby v. INS, 385 U.S. 276, 87 S.Ct. 483 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 81 S.Ct. 147 (1960)

(denaturalization); Addington v. Texas, supra (involuntary civil commitment proceedings) See also Hale v. Sterling, 369 Pa. 336, 85 A.2d 849 (1952)(action to establish a resulting trust in real estate) and Elliott v. Clausen, 416 Pa. 34, 204 A.2d 272 (1984)(action to set aside a transaction on the basis of mental incompetency); (B) to prove fraud; Murdoch v. Murdoch, 418 Pa. 219, 210 A.2d 490 (1965)(attempt to set aside a settlement based on fraud); (C) to rebut the strong presumption of legitimacy; Connell v. Connell, ____ Pa. Super ____, 477 A.2d 872 (1984)(attempt by husband to overcome presumption of legitimacy of a child born during

marriage and while he was living with his wife; and (D) to attempt to establish rights against a decedent's estate based upon an act or acts of the decedent during his lifetime; see Estate of Pitone, 489 Pa. 60, 413 A.2d 1012 (1980)(attempt to establish an inter vivos gift by decedent against decedent's estate). See also Estate of Reichel, 484 Pa. 610, 400 A.2d 1268 (1979), Beniger Estate, 449 Pa. 373, 296 A.2d 773 (1972), and Mooney's Estate, 328 Pa. 273, 194 A.2d 893 (1937).

A paternity trial does not resemble any of the above actions which require a heightened standard of proof. In a paternity suit the plaintiff or

complainant does not seek to terminate another's rights. The mother is not asking the court to strip the putative father of previously held rights. There are no allegations of fraud at issue nor is there an attempt to gain rights against a decedent's estate. Further, the complainant is not faced with the considerable burden of overcoming a strong presumption. In a paternity action, the plaintiff's primary aim is to establish and enforce the rights of the child born out of wedlock. The rights of the child are central to the suit and considerations of fairness and risk of error allocation are quite different than those traditionally

requiring the clear and convincing evidence standard.

In those jurisdictions where paternity proceedings are regarded civil in nature, as they are in Pennsylvania, the general rule is that the burden of proof of paternity is by a preponderance of the evidence. See 10 Am Jur 2nd 922 and 10 C.J.S., Bastards § 95. A majority of the courts which have considered the quantum of evidence issue in the "civil trial" jurisdictions, have affirmed the preponderance standard. See McFadden v. Griffith, 278 Ark. 460, 647 S.W. 2d 432 (1983); Walsh v. Palma, 154 Cal. App. 3rd 290, 201 Cal. Rptr. 142 (1984); Terasi v. Andrews, 3 Conn.

Cir.Ct. 449, 217 A.2d 75 (1965); People Ex Rel. Cizek v. Assarilo, 81 Ill. App. 3rd 1102, 37 Ill. Dec. 84, 401 N.E. 2d 311; Spears v. Veasley, 34 N.W. 2d 185 (1948); Dorsey v. English, 283 Md. 522, 390 A.2d 1133 (1978); Snay v. Snarr, 195 Neb. 375, 238 N.W. 2d 234; State (F) v. M, 96 N.J. Super. 335, 233 A.2d 65 (1967); Leach v. State, 398 P.2d 848 (1965); In Re F.J.F., 312 N.W. 2d 718 (1981); and Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W. 2d 467 (1964). The standard of proof called for by 42 Pa.C.S.A. § 6704(d) is in accord with the general rule.

The respective interests of the putative father, the child and the

mother are clear. Also clear is the interest of the Commonwealth in seeing that fathers support their children who are born out of wedlock so that those children do not become public charges. The standard of proof must be one that recognizes these interests and does not unduly risk the erroneous deprivation of any of them. On balance, the preponderance standard meets these demands and satisfies the requirements of due process. The order of the Common Pleas Court of Lancaster County is reversed and this case is remanded for proceedings consistent with this opinion.

Mr. Chief Justice Nix filed a dissenting opinion.

[J-151-1985]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JEAN MARIE MINNICH,	:	No. 161 E.D.
	:	Appeal Docket 1984
Appellant	:	
	:	Appeal from
v.	:	Judgment of the
	:	Court of Common
GREGORY L. RIVERA,	:	Pleas of Lancaster
	:	County,
Appellee	:	Pennsylvania,
	:	Domestic Relations
	:	Division
	:	No. 1435 of 1983
	:	
	:	ARGUED: OCTOBER
	:	22, 1985

DISSENTING OPINION

NIX, C. J. FILED: MARCH 21, 1986

Notwithstanding the heavy burden of proof demanded to sustain a constitutional challenge to an act of the General Assembly, it is my

considered opinion that the trial court was correct in concluding that due process requires that paternity be established by clear and convincing evidence. The preponderance standard specified by section 6704(g) of the Judicial Code, 42 Pa. C.S. §6704(g), is therefore unconstitutional.

The function of a standard of proof is "'to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" Addington v. Texas, 441 U.S. 418, 423 (1979), quoting In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J.,

concurring). The United States Supreme Court has identified three factors which must be balanced in determining the standard of proof required by due process in a particular type of proceeding:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citation omitted).

The private interests of the putative father in a paternity action

are of considerable importance. These interests were cogently described by the United States Supreme Court in Little v. Streater, 452 U.S. 1 (1981):

> The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. See Stanley v. Illinois, 405 US 645, 651-652, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972). Just as the termination of such bonds demands procedural fairness, see Lassiter v. Department of Social Services, post, p. 18, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981), so too does their imposition. Through the judicial process, the State properly endeavors to identify the father of a child born out of wedlock and to make him responsible for the child's maintenance. Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.

Id. at 13 (footnote omitted).

The second factor, the risk of an erroneous decision, also militates in favor of a heightened standard of proof. The testimony offered by the parties in a paternity suit is often of questionable reliability and the availability of eyewitnesses is unlikely. See, e.g., Little v. Streater, supra at 14.

The final factor to be considered is the government's interest in the standard of proof to be selected. The state shares the interest of the child

and the putative father in a just and accurate determination. See Little v. Streater, supra at 14; Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981). Moreover, the imposition of a more stringent standard of proof entails no additional time or expense to the government.

From the foregoing it is clear that the use of the preponderance standard in paternity proceedings does not satisfy the requirements of due process. The preponderance standard is the least demanding standard known to the law. Commonwealth v. Ehredt, 485 Pa. 191, 401 A.2d 358 (1979); Commonwealth v. Mitchell, 472 Pa. 553, 372 A.2d 826

(1977); Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950). To satisfy that standard the party bearing the burden need only present evidence which outweighs the opposing evidence in probative value. Se-Ling Hosiery, Inc. v. Margulies, supra. In contrast a "clear and convincing evidence" standard requires that

> [T]he witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.... It is not necessary that the evidence be uncontradicted..., provided it "carries a clear conviction to the mind"...or carries "a clear conviction of its truth....."

> In re Estate of Fickert, 461 Pa. 653, 658, 337 A.2d 592, 594 (1975) quoting La Rocca Trust, 411 Pa. 633, 640, 192 A.2d 409, 413 (1963).

See also Thomas v. Seaman, 451 Pa. 347, 304 A.2d 134 (1973); Broida v. Travelers Insurance Co., 316 Pa. 444, 175 A.2d 492 (1934).

The "clear and convincing evidence" standard is required in Pennsylvania to prove a number of types of claims in civil actions. See, e.g., Butler v. Butler, 464 Pa. 522, 347 A.2d 477 (1975) (facts necessary to overcome presumption of gift); Elliot v. Clausen, 416 Pa. 34, 204 A.2d 272 (1964) (incompetency sufficient to rescind transaction); Stevenson v. Stine, 412 Pa. 478, 195

A.2d 268 (1963) (title by adverse possession); Hale v. Sterling, 369 Pa. 336, 85 A.2d 849 (1952) (resulting trust); Gilberti v. Coraopolis Trust Co., 342 Pa. 161, 19 A.2d 408 (1941) (fraud); Mooney's Estate, 328 Pa. 273, 194 A. 893 (1937) (wages owed by decedent for personal service); Boyertown National Bank v. Hartman, 147 Pa. 558, 23 A. 842 (1892) (reformation of contract on grounds of mistake); McKenna v. McKenna, 282 Pa. super. 45, 422 A.2d 668 (1980) (change of domicile).

Paternity is at least as if not more fundamental than the above-enumerated subjects. Most compelling is the United

States Supreme Court's recent ruling in Santosky v. Kramer, 455 U.S. 745 (1982), which held that clear and convincing evidence must be presented in order to terminate the parental relationship. It would appear that that issue and the issue with which we are here faced are on equal footing. The individual rights affected by the creation of a parental relationship are as significant as the rights affected by the extinguishment of that relationship. I would hold that the same quality of evidence should be required to create that relationship as to destroy it. I therefore dissent.

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
D O M E S T I C

JEAN MARIE MINNICH	:	
	:	No. 1435 of 1983
vs.	:	
	:	Paternity
GREGORY L. RIVERA	:	

M O T I O N

1. The issue in this action is the paternity of Plaintiff's child, Cory Minnich.

2. Plaintiff's burden of proof is established by 42 Pa. C.S. §6704(g) as proof by a "preponderance of the evidence."

3. Defendant avers that the statutory burden of proof offends the Due Process doctrine under Article One, Section One of the Pennsylvania Constitution and the Due Process clause

of the fourteenth amendment to the United States Constitution.

4. Defendant avers that Due Process requires that the burden of proof be proof by "clear and convincing evidence" and that the factfinder must be charged accordingly.

WHEREFORE, Defendant moves this Honorable Court to:

a. find that 42 Pa. C.S. §6704(g) is unconstitutional in imposing a burden of proof by a "preponderance of the evidence;"

b. find that Due Process, both on the basis of the Pennsylvania and the United States Constitution, requires the imposition of a burden of proof by clear and convincing evidence;

c. instruct the factfinder accordingly.

Respectfully submitted,

William Watt Campbell
Suite 315
53 North Duke Street
Lancaster, PA 17602
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing upon Mary Louise Barton by leaving a copy at her office on April 13, 1984.

William Watt Campbell

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS DIVISION

JEAN MARIE MINNICH :
: No. 1435 of 1983
vs. :
: Paternity
GREGORY L. RIVERA :

MOTION FOR NEW TRIAL

Defendant Gregory Rivera moves the Court for a new trial in this action and as grounds sets forth the following:

1. After a jury trial before the Honorable Paul A. Mueller, Jr., on April 24, 1984, a verdict was returned against Defendant, finding him to be the father of Plaintiff's child.

2. Defendant filed a pre-trial motion seeking a finding that 42 Pa. C.S. §6704(g) is unconstitutional in that it imposes a burden of proof by a

preponderance of the evidence, a finding that the Pennsylvania and Federal Constitutions require proof by clear and convincing evidence in a paternity case, and a finding that the jury should be instructed accordingly. The Defendant alleged specifically that the Due Process requirements of the two constitutions are not met by the preponderance standard. The Court denied Defendant's motion prior to charging the jury. Defendant alleges that this was error.

3. The Court erred in refusing to give Defendant's Instruction Number 2, filed at time of trial, to which refusal Defendant timely excepted. The refusal to give this Instruction prejudiced the right of Defendant to a trial consistent

with Due Process requirements as to burden of proof. Defendant's Instruction Number 2 is incorporated herein by reference.

4. The Court erred in denying Defendant the opportunity to show to the jury Chris Rivera standing beside the Plaintiff and her child. Defendant was harmed thereby in that the jury was prevented from considering relevant and material evidence for which a proper foundation had been made.

5. The Court erred in refusing to give Defendant's Instruction Number 3, filed at time of trial, to which refusal Defendant timely excepted. Defendant's Instruction Number 3 is incorporated herein by reference. The Defendant was prejudiced thereby and that the jury was

not instructed as to the legal effect of a factual decision by them that Plaintiff had had sex with Chris Rivera.

WHEREFORE, Defendant moves the Court to grant him a new trial.

WILLIAM WATT CAMPBELL
Attorney for Defendant

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS DIVISION

JEAN MARIE MINNICH :
: No. 1435 of 1983
vs. :
: Paternity
GREGORY L. RIVERA :

O R D E R

AND NOW, this day of May 1984, Defendant having filed a Motion for a New Trial, the Court orders the Court Reporter to transcribe the following portions of the record in this action:

BY THE COURT:

J.

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1986

No.

JEAN MARIE MINNICH,
Appellee

vs.

GREGORY L. RIVERA,
Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 1986, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, I served counsel for Jean Marie Minnich by personal service at her office at 50 North Duke Street, Lancaster, PA 17602.

28 U.S.C. §2403(b) may be applicable. Pursuant to Rule 28.4(c) of the Rules of the Supreme Court, I have served three copies of this document by first class mail, postage prepaid on June 17, 1986, on LeRoy S. Zimmerman, Attorney

General of the Commonwealth of Pennsylvania, 16th Floor, Strawberry Square, Harrisburg, PA 17120.

William Watt Campbell
Suite 305
53 North Duke Street
Lancaster, PA 17602

NO. 86-98

IN THE SUPREME COURT OF
THE UNITED STATES

JEAN MARIE MINNICH

VS.

GREGORY L. RIVERA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Mary Louise Barton
Assistant District Attorney

Attorney For Jean Marie Minnich

Office of the District Attorney
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50 North Duke Street
Lancaster, Pennsylvania 17602
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TABLE OF CITATIONS

CASES

STATUTES

OTHER SOURCES & OTHER MATERIALS

ARGUMENT

Pennsylvania's paternity statute is not unconstitutional as violative of due process for two (2) reasons:

1. The Pennsylvania Legislature, along with at least 40 other state legislatures across the United States, has clearly expressed the intent of the Legislature in the Pennsylvania Civil Procedure Support Law, Act No. 1978-46, P.L. 106, amended 1982, effective June 27, 1978, to make the determination of paternity purely a civil action, including specifying the burden of proof as the preponderance of evidence. 42 Pa.C.S.A., Section 6704(d). Courts may refuse to enforce a statute only if it "clearly, palpably, and plainly" violates the Constitution. Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 331 A.2d 198 (1975). There is a strong presumption

of constitutionality and a heavy burden of persuasion upon one who challenges the constitutionality of an act of the legislature. Commonwealth v. Mikulan, 504 Pa. 244 , 470 A.2d 1339, 1340 (1983).

2. The putative father in a paternity proceeding is guaranteed: representation of counsel, Corra v. Coll, 305 Pa. Super. 179, 451 A.2d 480; blood test groupings, Little v. Streater, 452 U.S. 1, 68 L.Ed. 627, 101 S.Ct. 2202 (1981); a trial with jury, 42 Pa.C.S.A., Section 6704; plus, all the rules set forth in the Rules of Civil Procedure as to Actions for Support, Rule 1910.1 et seq. These guarantees provide the putative father with the fundamental requirement of due process: the right to be heard at a meaningful time in a meaningful

manner. Matthews v. Elridge, 424 U.S. 319, 47 L.Ed. 18, 96 S.Ct. 893 (1976).

CONCLUSION

The Respondent respectfully requests that Your Honorable Court dismiss the appeal from the Supreme Court of Pennsylvania on the grounds that the writ of certiorari does not present a substantial federal question and that the judgment rests on an adequate non-federal basis.

Respectfully submitted,

Mary Louise Barton
Assistant District Attorney

Attorney For Respondent
Jean Marie Minnich

No. 86-98

IN THE

Supreme Court of the United States

October Term, 1986

GREGORY L. RIVERA,

Appellant,

vs.

JEAN MARIE MINNICH,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JOINT APPENDIX

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Attorney for Appellee

* *Counsel of Record*

APPEAL DOCKETED JULY 18, 1986
JURISDICTION NOTED NOVEMBER 17, 1986

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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-98

GREGORY L. RIVERA,

Appellant,

vs.

JEAN MARIE MINNICH,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JOINT APPENDIX

Docket Entries—Lancaster County,
Court of Common Pleas

State of Pennsylvania, }
County of Lancaster, } ss.:

RECORD FILED IN
SUPREME COURT
JAN 21 1985
EASTERN DISTRICT

AMONG THE RECORDS entered in the Court of Common Pleas in and for the County of Lancaster, in the Commonwealth of Pennsylvania, to Jean Marie Minnich v. Gregory L. Rivera Term, 1983 No. 1425 is contained the following:

Docket Entries—Lancaster County, Court of Common Pleas.

DOCKET - ENTRIES:

1. June 17, 1983: Complaint (2 pages)

2. August 28, 1983: Notice of Right to Trial on Issue of Paternity and Demand for Jury Trial (1 page)

3. October 21, 1983: Petition for H.L.A. Blood Tests and Order (3 pages)

4. April 4, 1984: Order granting Defendant's request for jury trial and directing case be listed for trial (2 pages)

5. April 6, 1984: Order scheduling pretrial conference (1 page)

6. April 9, 1984: Defendant's Pre-Trial Memorandum (2 pages)

7. April 9, 1984: Plaintiff's Pre-Trial Memorandum (6 pages)

8. April 13, 1984: Certification Order (2 pages)

9. April 13, 1984: Defendant's Supplemental Pre-Trial Memorandum

10. April 13, 1984: Defendant's Motion for Discovery of Court Record and Rule (4 pages)

11. April 13, 1984: Defendant's Motion and Rule (3 pages)

12. April 16, 1984: Plaintiff's Petition and Order (3 pages)

13. April 18, 1984: Defendant's Brief in Support of Defendant's Motion Re: Burden of Proof (8 pages)

14. April 19, 1984: Plaintiff's Memorandum of Law (2 pages)

Docket Entries—Lancaster County, Court of Common Pleas.

15. April 19, 1984: Plaintiff's Answer to Defendant's Motion for Discovery (2 pages)

16. April 19, 1984: Order granting Defendant's Motion for Discovery (2 pages)

17. April 24, 1984: Verdict (2 pages)

18. May 3, 1984: Defendant's Motion for New Trial (4 pages)

19. May 7, 1984: Order to transcribe transcript of trial (3 pages)

20. May 31, 1984: Plaintiff's Petition to Proceed In Forma Pauperis (4 pages)

21. June 22, 1984: Transcript of Proceedings—Paternity Jury Trial (90 pages)

22. August 24, 1984: Defendant's Brief in Support of Motion for New Trial (19 pages)

23. September 11, 1984: Plaintiff's Brief (8 pages)

24. October 19, 1984: Opinion and Order (11 pages)

25. October 23, 1984: Plaintiff's Notice of Appeal and Proof of Service (5 pages)

26. November 13, 1984: Order granting Petition to Proceed In Forma Pauperis (5 pages)

Complaint

IN THE COURT OF COMMON PLEAS
of Lancaster County, Pennsylvania
Domestic Relations Section

RECORD FILED IN
SUPREME COURT
JAN 21 1985
EASTERN DISTRICT

Civil Action-Support
No. 1435 of 1983

JEAN M. MINNICH,

Plaintiff,

vs.

PETE RIVERA,

Defendant.

COMPLAINT

HONORABLE, THE JUDGES OF SAID COURT:

1. The Plaintiff is Jean M. Minnich, 1019 Barber Street, Columbia, Pennsylvania.

2. The Defendant is Pete Rivera, 414 Beaver Street, Lancaster, Pennsylvania.

3. The Plaintiff and the Defendant were never married.

4. The Plaintiff and the Defendant are the parents of the dependent children born out of wedlock:

Cory Michael Minnich age 2 wks. born May 28, 1983

The child reside at 1019 Barber Street, Columbia, Penna. 17512.

Complaint.

5. The Defendant has failed to provide adequate support for Cory Michael Minnich since _____, 19_____.

6. The Plaintiff is receiving Public Assistance in the amount of $181.00 per month for the support of 1.

7. The Defendant may be identified by the following: Puerto Rican, 5'4", _____ lbs., brown eyes, Black hair, _____ years of age, DOB ___/___/___, Social Security #_____.

WHEREFORE, Plaintiff requests that an order be entered against Defendant and in favor of the Plaintiff and the aforementioned child (ren) for reasonable support.

I verify that the statement made in this Complaint are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

JEAN MINNICH
Jean Minnich
Plaintiff

Date 6-17-83

Notice of Right to Trial on Issue of Paternity

IN THE COURT OF COMMON PLEAS
of Lancaster County
Domestic Relations Section

RECORD FILED IN
SUPREME COURT
JAN 21 1985
EASTERN DISTRICT

Case No. 831435

JEAN MARIE MINNICH,

Plaintiff,

vs.

GREGORY L. RIVERA,

Defendant.

NOTICE OF RIGHT TO TRIAL ON
ISSUE OF PATERNITY

The defendant has not acknowledged paternity of the child, namely, Cory Michael Minnich born on 5/28/83 in Lancaster, Pa. to Jean Marie Minnich.

The parties are hereby advised of their respective rights to (1) a trial on the issue of paternity and (2) an attorney to represent them on the issue of paternity and in any support proceedings. I understand that if I am unable to afford an attorney one will be appointed free of charge.

The trial shall be without jury unless either party demands a trial by jury in writing within ten days from

the date of this notice on the DEMAND FOR JURY TRIAL below.

FRAN GANSE
Domestic Relations Officer

Date 8/28/83

I acknowledge receipt of a copy of this notice as of this date August 28, 1983.

JEAN MINNICH
Jean Marie Minnich
Plaintiff

GREGORY L. RIVERA
Gregory L. Rivera
Defendant

DEMAND FOR JURY TRIAL

I hereby demand a trial by jury on the issue of paternity.

GREGORY L. RIVERA
Gregory L. Rivera

Date 8/28/83

Petition for H.L.A. Blood Tests and Order

IN THE COURT OF COMMON PLEAS
of Lancaster County, Pennsylvania
Domestic Relations Section

No. 1435-83
Action for Support

JEAN MARIE MINNICH,

Petitioner,

GREGORY L. (PETE) RIVERA,
S.S. #182-46-7641,

Respondent.

PETITION FOR H.L.A. BLOOD TESTS

TO THE HONORABLE, THE JUDGES OF SAID COURT:

AND NOW, this 21st day of October, 1983 the Office of the District Attorney by James R. McManus, III, Assistant District Attorney, for Jean Marie Minnich, Petitioner, respectfully represents that:

1. The Petitioner is Jean Marie Minnich of 1019 Barber St., Columbia, Pa. 17512.

2. The Respondent is Gregory L. (Pete) Rivera of 414 Beaver Street, Lancaster, Pa.

3. The Petitioner filed a Complaint in Support of her child, Cory Michael Minnich on June 17, 1983 against the Respondent.

Petition for H.L.A. Blood Tests and Order.

4. Petitioner is a poor person whose income is limited to monthly grants from the Department of Public Assistance.

5. Petitioner is a 15 years of age female who supports herself and her child.

6. The Respondent denies that he is the father of Cory Michael Minnich.

7. The Petitioner believes that the H.L.A. blood tests will conclusively establish whether the Respondent is the father of Cory Michael Minnich.

WHEREFORE, the Petitioner respectfully requests Your Honorable Court to order that the H.L.A. tests be administered to all parties in this matter.

Respectfully submitted,

OFFICE OF THE
DISTRICT ATTORNEY
By: JAMES R. McMANUS, III
James R. McManus, III
Assistant District Attorney

Commonwealth of Pennsylvania }
County of Lancaster } ss:

I, James R. McManus, III, Assistant District Attorney, being duly affirmed according to law, depose and say that the facts set forth in the foregoing Petition are true and correct to the best of my knowledge information, and belief.

JAMES R. McMANUS, III
James R. McManus, III
Assistant District Attorney

Affirmed and subscribed before me this 21st day of October 1983.

DIANE M. FRALICH
Diane M. Fralich, Notary Public
Lancaster, Lancaster Co., PA
My Commission Expires Feb. 18, 1985

ORDER.

(Same Title.)

RECORD FILED IN
SUPREME COURT
JAN 21 1985
EASTERN DISTRICT

AND NOW, this 21st day of October, 1983 upon consideration of the foregoing Petition and upon Motion of James R. McManus, III, Assistant District Attorney for Lancaster County, IT IS ORDERED AND DECREED that the child, Cory Michael Minnich, the plaintiff, Jean Marie Minnich, and the Defendant, Gregory L. (Pete) Rivera, submit themselves at 1:30 o'clock P.M. on Monday, October 31, 1983, to Room 301, Third Floor, Lancaster County Courthouse, Lancaster, Pennsylvania, for H.L.A. blood tests to determine paternity as authorized by the Act of July 13, 1961, P.L. 587 as amended July 9, 1976, P.L. 586 No. 142 *et seq.*, 42 Pa. C.S.A. §6131 *et seq.* Said tests shall be performed in accordance with the procedures established by the Court, costs on the county pending results of the tests. Copies of the test results shall be forwarded to the Office of the District Attorney and to the Defendant or to Defendant's counsel.

BY THE COURT:

(ILLEGIBLE)
J.

ATTEST:
Dorothea S. Bryson

Pre-Trial Motion *re* Burden of Proof

See Jurisdictional Statement, Appendix "D".

Trial Transcript Containing Initial Ruling on Burden of Proof

[69] Lancaster County Court Of Common Pleas

rebuttal.

THE COURT: All right. Members of the jury, this in the point in the trial where all the evidence is in so we are just going to proceed right ahead with the closing arguments of counsel and I will charge you and then you will begin your deliberations as soon as all of that is completed.

May I see counsel one minute so I can advise you?

(The following discussion was held at sidebar.)

The Court: The first point that I'm going to rule on, there had been an outstanding request by Defendant's counsel on a question of what the Court will charge as to the burden of proof and the Court is going to stand by the statutory burden of proof as set forth in Section 6704 of Title 42, Pennsylvania Consolidated Statutes relating to preponderance of the evidence.

The Court will, in advance, grant your first point for charge and refuse your second point of Defendant's.

Mr. Campbell: And the third point for charge is?

Verdict

IN THE COURT OF COMMON PLEAS
of Lancaster County, Pennsylvania
Domestic Relations Section

No. 1435-83

RECORD FILED IN
SUPREME COURT
JAN 21 1985
EASTERN DISTRICT

JEAN MARIE MINNICH,

vs.

GREGORY L. RIVERA.

VERDICT

X We find in favor of Jean Marie Minnich, Plaintiff, and against Gregory L. Rivera, Defendant, and find that Defendant is the father of Cory Michael Minnich.

___ We find in favor of Gregory L. Rivera, Defendant, and against Jean Marie Minnich, Plaintiff.

Larry E. Wolf

Karen J. Stoltzfus

Gladys I. Kissinger

Lloyd B. Denlinger

Sarah E. Brownberger

Esther B. Yeager

Verdict.

Gwendolyn C. Duncan

Elizabeth A. Wynn

Mary MacKinnon

Carol A. Steffy

Sarah Belle Glasser

Sandra Simione

Paul A. Mueller, Jr. - Judge
Brenda Hamilton - Court Reporter

Motion for New Trial.
Trial Court Opinion.
Pennsylvania Supreme Court Opinion.

Motion for New Trial

See Jurisdictional Statement, Appendix "E".

Trial Court Opinion

See Jurisdictional Statement, Appendix "B".

Pennsylvania Supreme Court Opinion

See Jurisdictional Statement, Appendix "C".

No. 86-98 (4)

IN THE

Supreme Court of the United States

October Term, 1986

GREGORY L. RIVERA,

Appellant,

vs.

JEAN MARIE MINNICH,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR APPELLANT

WILLIAM WATT CAMPBELL*
Suite 305
53 North Duke Street
Lancaster, Pennsylvania 17602
(717) 392-2213

JAMES R. ADAMS
126 East King Street
Lancaster, Pennsylvania 17602

Attorneys for Appellant

* *Counsel of Record*

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28 pgs

I. Question for Review

Does the Pennsylvania statute which permits paternity to be determined only by a "preponderance of the evidence" violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

II. TABLE OF CONTENTS.

III. TABLE OF AUTHORITIES.

STATUTES.

REGULATION.

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-98

GREGORY L. RIVERA,

Appellant,

vs.

JEAN MARIE MINNICH,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR APPELLANT

IV. Opinions and Judgment Below

The Opinion of the Court of Common Pleas of Lancaster County, Pennsylvania, granting Appellant a new trial due to the unconstitutionality of the Pennsylvania Support Law is reported at *Minnich v. Rivera*, 69 Lancaster L.Rev. 329 (1984) and is Appendix B to the Jurisdictional Statement in this case. The Supreme Court of Pennsylvania reversed and found the statute to be constitutional. *Minnich v. Rivera*, 509 Pa. 588, 506 A.2d 879 (1986). This Opinion is Appendix C to the Jurisdictional Statement filed in this case.

V. Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1257 (2), in that a Pennsylvania statute was found to be valid in the face of a constitutional challenge. The Pennsylvania Supreme Court decision was rendered March 21, 1986. A notice of appeal was filed in the Supreme Court of Pennsylvania on April 18, 1986 (Appendix A to Jurisdictional Statement). The case was docketed in the Supreme Court of the United States pursuant to this Court's Rule 12. The filing of the notice of appeal and the docketing of the case, including the filing of the Jurisdictional Statement, were completed within 90 days from the March 21, 1986 entry of the order of the Supreme Court of Pennsylvania.

VI. Statutory and Constitutional Provisions

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." Fourteenth Amendment, Constitution of the United States.

"Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. *The burden of proof shall be by a preponderance of the evidence.*" 42 Pa.C.S. §6704(g). (emphasis added)

On October 30, 1985, the Pennsylvania statute was repealed and replaced with the following, in which the operative language in this case was retained verbatim:

"Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be made by the court in a civil action without a jury unless either party demands trial by jury. *The burden of proof shall be by a preponderance of the evidence.*" 23 Pa.C.S. §4343(a) (Supp. 1986) (emphasis added)

VII. Statement of the Case

Gregory L. Rivera, Appellant, is the Defendant in a child support case commenced June 17, 1983, by Jean Marie Minnich, Appellee. Appellant denied paternity and trial was scheduled before a jury on April 24, 1984. On April 13, 1984, Appellant filed a petition asking the court to declare that the burden of proof set by the Pennsylvania paternity statute violated Defendant's due process rights under the federal constitution (Jurisdictional Statement Appendix D).

The trial court issued a Rule against Appellee/Plaintiff to show cause why the burden of proof should not be set at proof by clear and convincing evidence. Appellee filed an answer in opposition to the Rule. The trial court then reserved its ruling on the burden of proof issue. At the close of testimony, Appellant's petition was denied. The jury found in favor of Appellee/Plaintiff.

The record of the trial is found at docket entry number 21. All page numbers herein are referenced to the page of the transcript of the trial at which the testimony referred to may be found. Appellee testified that she had sex with Appellant two to three times in the Summer of 1982 (p. 23). The one time she described took place in Appellant's van outside his place of employment during a work break (pp. 23-24). Appellant was 15 years old during the time the child in question was conceived (p. 30) and 16 at the time of testimony (p. 19). Appellant was never contacted during the pregnancy about the existence of the child (p. 26). Appellant paid no support and had no contact with Appellee (p. 27). The support proceedings and consequently the paternity determination did not begin until Appellee began to receive welfare benefits (pp. 30, 31, 47). If Appellee had not named a father, her public assistance would have been terminated (p. 47). The child was given Appellee's last name rather than Appellant's (p. 31).

Plaintiff's attorney was permitted to show the child, the Appellee and the Appellant standing together to "see if the jury sees any physical resemblance." (p. 33).

Appellee's sister, age 19, testified that Appellee and Appellant had sex (p. 40). She further testified that Appellant's brother Chris was in the van and that she had sex with him while her sister and Appellant were having sex (p. 41).

Christopher L. Rivera, brother of Appellant, testified that he received a court order to have a blood test in regard to the paternity determination at issue in this case and that he refused to cooperate (pp. 51-54).

Appellant testified that he had sex with Appellee (pp. 59, 62). He further testified that Appellee and his brother Chris were alone in the back of the van together, that they had the opportunity to have sex (pp. 63, 64).

Maria Rivera, sister of Appellant testified that Appellee informed her that Gregory Rivera was not the father of the child in question (p. 67).

Appellant filed a motion for new trial alleging, in part, that it was error for the trial court to have denied Appellant's petition seeking a declaration that the burden of proof by a preponderance of the evidence violated his due process rights under the federal constitution. (Jurisdictional Statement, Appendix E).

Appellant's motion for a new trial was granted October 19, 1984 on the ground that 42 Pa.C.S. §6704(g) (now 23 Pa.C.S. §4343(a) (Supp. 1986)) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because the state statute fails to require proof of paternity by at least "clear and convincing" evidence (Jurisdictional Statement, Appendix B).

VIII. Summary of Argument

The burden of proof in paternity actions has been set by the Pennsylvania legislature at proof by a preponderance of the evidence. The authority of the Commonwealth to set a burden of proof is limited by the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Due Process requires a higher burden of proof—that of proof by clear and convincing evidence.

Weighing the relevant factors, imposition of a parental relationship calls for the higher burden of proof. The private interests affected are substantial—in terms of liberty, money and emotions. A potential for imprisonment follows from a determination of paternity. The risk of error is peculiarly great in this area due to the nature of the evidence, including blood tests. The governmental interest supports using the higher burden of proof, in that the government is interested in assuring that the correct person is identified as the father.

Termination of a parental relationship requires proof by clear and convincing evidence. There is no constitutionally significant difference between termination and creation of a parental relationship. Therefore, creation of a parental relationship also requires proof by clear and convincing evidence. This burden of proof is one which the state courts commonly employ in numerous, often less serious, forms of civil actions.

Evaluation of the entire statutory scheme for a determination of paternity supports this conclusion. The paternity hearing provides the sole opportunity for controverting the mother's allegations.

IX. ARGUMENT

A. The consequences of a determination of paternity are substantial.

The imposition of parental obligations by a determination of paternity involves substantial legal consequences in Pennsylvania. The determination itself is final and may not be relitigated. *Norris v. Beck*, 282 Pa.Super. 420, 422 A.2d 1363 (1980).

First, a parent is liable for the support of unemancipated children 18 years of age or younger and may be liable for the support of a child over 18. 23 Pa.C.S. §43231 (Supp. 1986). *Emerick v. Emerick*, 445 Pa. 428, 284 A.2d 682 (1971); *Verna v. Verna*, 288 Pa.Super. 511, 422 A.2d 630 (1981). All of a parent's net income and assets may be considered in entering an order for support, regardless of their source. 23 Pa.C.S. §4322 (Supp. 1986); *Butler v. Butler*, 339 Pa.Super. 312, 488 A.2d 1141 (1985).

If the court determines that health care coverage is available as a benefit of employment at no cost or at a reasonable cost, a parent may be ordered to provide it. Additionally, the parent may be required to pay a percentage of reasonable and necessary health care expenses. 23 Pa.C.S. §4324 (Supp. 1986); 42 U.S.C. §652(f). A child is eligible for workmen's compensation benefits through the parent, 77 P.S. §562. The support obligation continues without reference to the amount of time a child spends with a parent. *Melzer v. Witsberger*, 505 Pa. 462, 472 n.6, 480 A.2d 991, 996 (1984).

Second, imposition of parental status may lead to significant interference in the new parent's financial affairs. A parent who fails to comply with the support order may have his wages, salary or commissions

attached. Pa.R.Civ.P. 1910.22; 23 Pa.C.S. §4348 (Supp. 1986). A 10 percent penalty may be imposed by the court for any amount in arrears in excess of 30 days, upon the finding that the failure to pay was willful. 23 Pa.C.S. §4348(c) (Supp. 1986). Any income tax refunds, both state and federal, are subject to being confiscated to pay child support arrearages. 42 U.S.C. §664; 23 Pa.C.S. §4307 (Supp. 1986). Information regarding the amount of arrears may be provided to "any consumer credit bureau organization upon the request of the organization." 23 Pa.C.S. §4303(a) (Supp. 1986). A person subject to a Court order is thereafter obligated to report changes in employment and home address to the court, under penalty of contempt proceedings. 23 Pa.C.S. §4353 (Supp. 1986).

Third, where there is a failure to pay a support order, there also is a substantial potential for deprivation of physical liberty. 23 Pa.C.S. §4345 (Supp. 1986) provides:

> "(a) General Rule—A person who willfully fails to comply with any order under this chapter, except an order subject to section 4344 (relating to contempt for failure of obligor to appear), may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:
>
> (1) Imprisonment for a period not to exceed six months.
>
> (2) A fine not to exceed $500.
>
> (3) Probation for a period not to exceed six months.
>
> (b) Condition For Release—An order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor."

The procedural rules for civil contempt are set out in Pa.R.Civ.P. 1910.21.

Fourth, the paternity finding can lead to criminal liability for failure to pay support. 18 Pa.C.S. §4304 provides: "*a parent*, guardian, or other person supervising the welfare of a child under 18 years of age *commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of* care, protection or *support.*" (emphasis added). A misdemeanor of the second degree is punishable by a sentence of imprisonment up to two years, 18 Pa.C.S. §1104, and a fine of up to $5,000, 18 Pa.C.S. §1101. The Governor of Pennsylvania may extradite persons where a criminal charge is pending involving failure to provide support. 23 Pa.C.S. §4505. When a support order is entered in a Protection From Abuse action, willful noncompliance may cause imprisonment for up to six months and a $1,000 fine. 35 P.S. §§10186(a)(5) and 10190.

Fifth, one found to be a parent is obliged to provide medical care for a child, even over religious objections. *Commonwealth v. Barnhart*, 345 Pa.Super. 10, 497 A.2d 616 (1985).

Sixth, a determination of paternity may result in the child having rights in the father's estate through the laws of intestacy. 20 Pa.C.S. §2107(c). A child born out of wedlock must prove his right to share in the father's estate by "clear and convincing" evidence unless there is "a prior determination of paternity." 20 Pa.C.S. §2107(c)(3). That prior paternity determination, however, need only be by a "preponderance of the evidence". 22 Pa. C.S. §4343(a) (Supp. 1986). *See also*, 20 Pa.C.S. §§2514(8), 3538 and 6114(5).

A child born out of wedlock generally has all the rights and privileges of a child born during wedlock. 48 P.S. §167. All of a parent's real and personal property is liable for assistance provided to his unemancipated minor children "incurred by any public body or public agency." 62 P.S. §1974.

B. Due process requires that a finding of paternity be supported by clear and convincing evidence.

> "To experienced lawyers, it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall*, 357 U.S. 513, 520-521 (1958).

While it may be true that "the ultimate truth as to how the standards of proof affect decision making may well be unknowable," (*Addington v. Texas*, 441 U.S. 418, 424-425 (1979)) at least use of the clear and convincing standard precludes a determination of paternity based on a finding that in the scales of evidence, the scales tipped "ever so slightly or to the slightest degree" in favor of one party. Pennsylvania Standard Jury Instructions (Civil) at Section 5.50 (copy attached).

Appellant concedes that determination of paternity by the preponderance of the evidence is the general rule in the United States, New York being a notable exception. *Rebmann v. Muldoon*, 23 A.D.2d 163, 259 N.Y.S.2d 257 (1965); *E.E. v. F.F.*, 106 A.D.2d 694, 483 N.Y.S.2d 748 (1984). The Supreme Court of Pennsylvania stated:

> "A majority of the courts which have considered the quantum of evidence issue in the 'civil trial' jurisdictions, have affirmed the preponderance standard." *Minnich v. Rivera*, 509 Pa. 588, 596, 506 A.2d 879 (1986).

A review of the cases cited by the Pennsylvania Supreme Court in *Minnich* reveals, however, that not one of those cases analyzed the burden of proof issue in the context of the United States Constitution; in most of them, there was no challenge to the use of the standard. The issue presented in the instant case has not been presented or considered in any other case, to the best of counsel's knowledge.

From an historical perspective, a stricter standard is appropriate—conceivably even proof beyond a reasonable doubt. Paternity determinations were made exclusively through the criminal justice system in Pennsylvania from colonial times through 1963. From 1963 until 1978, both criminal and civil proceedings were available to determine the paternity of illegitimate children. The Pennsylvania criminal statute through which paternity could be determined (Act of June 24, 1939, June 24, P.L. 872, Section 732, 18 P.S. §4732), was repealed effective June 27, 1978. Act of April 28, 1978, P.L. 106, No. 46. Since 1978, a civil proceeding is the exclusive method for determination of paternity in Pennsylvania. 23 Pa.C.S. §4341 *et seq. Mansfield v. Lopez*, 288 Pa.Super. 567, 573 n.4, 432 A.2d 1016, 1019-1020 n.4 (1981); *Com. ex rel. Miller v. Dillworth*, 204 Pa.Super. 420, 205 A.2d 111 (1964).

The state may set and revise burdens of proof, but only within the requirements of due process, pursuant to the Fourteenth Amendment to the United States Constitution.

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of

> factual conclusions for a particular type of adjudication'." *Addington v. Texas*, 441 U.S. 418, 423 (1979).

Three factors must be evaluated to determine the standard of proof required in paternity actions by the Due Process Clause.

> "[F]irst, the private interest that will be affected the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safe guards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

First, analysis of the private interests involved mandates use of the clear and convincing standard. The determination of paternity is irreversible. *Norris v. Beck*, 282 Pa.Super. 420 (1980). The consequences of such a determination are reviewed at length in Section IX (A) of this Brief. An intermediate burden of proof is required because the "individual interests at stake" are far more substantial than the mere loss of money. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). The analysis of the importance of the parent-child relationship set out in *Santosky v. Kramer*, 455 U.S. 745 (1982), applies with equal force in our case. Paternity proceedings are simply the reverse of the termination of parental rights proceedings considered in *Santosky*. There is no constitutionally significant difference.

> "The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the

> creation of a parent-child relationship. This Court frequently has stressed the familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. [citation omitted] Just as the termination of such bonds demands procedural fairness, [citation omitted] so to does their imposition. Through the judicial process, the state properly endeavors to identify the father of a child born out of wedlock and to make him responsible for the child's maintenance. Obviously, *both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.*" *Little v. Streater*, 452 U.S. 1, 13 (1981) (emphasis added).

The mother of the child and the state have an interest in identifying the actual father of the child and holding him responsible, but have no interest in an erroneous decision on that issue. The child has a heightened interest in a correct paternity determination in order to obtain correct genetic and medical history through the proper father. The child has emotional and psychological needs to know their true parents. *J.H. v. M.H.*, 177 N.J. Super. 436, 426 A.2d 1073 (1980). The state similarly has a heightened interest in a correct determination because:

> "It is furthermore clear that the state's future administrative burdens would be lessened since a correct determination of paternity increases the chance that the adjudged parent will comply with support obligations." *Corra v. Coll*, 305 Pa.Super. 179, 193, 451 A.2d 480, 488 (1982).

The second factor, the risk of error in the decision, especially supports a heightened burden of proof in these cases. Evidence in paternity cases consists of blood test results and the traditional testimony of the persons involved. The use of blood tests to provide evidence of probability that the defendant is the father of the child in question is a relatively recent development.

HLA blood tests are conducted with blood samples obtained from the mother of the child and the putative father. Up to 62 blood typing procedures may be employed to determine common genetic factors between putative parent and child. Once the blood grouping, or genetic markers, are obtained, the results are statistically manipulated in two fashions—first by use of statistical studies for the frequency of genetic factors in various ethnic groups and second with a probability formula. That probability formula "assumes that there is a 50 percent chance that the defendant and mother had intercourse and that the defendant is indeed the father of the child . . . the 50 percent assumption has no scientific basis, but is employed precisely because nothing is known about whether intercourse actually took place between the parties at a time when conception could have occurred." *Everett v. Everett*, 150 Cal. App.2d 1053, 201 Cal. Rptr. 351 (1984). If the 50 percent assumption was replaced with a different percentage, the probability of paternity would vary considerably.

In the instant case, Appellant attempted to show that his brother also had sex with Appellee. HLA blood tests might not exclude an alleged father who would have been excluded by red blood cell tests if the alleged father and the real father are related. *Turek v. Hardy*, 312 Pa.Super. 158, 161, 458 A.2d 562, 564 (1983). For examples of the complexity of employment of these tests in the disputed paternity case see *Everett v. Everett*, 150 Cal. App.3d 1053, 201 Cal. Rptr. 351, 360 (1984), and "Admissibility, Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases." Annot., 37 ALR 4th 167 (1985).

> "The proper evidentiary weight to be given to these techniques is still a matter of academic dispute." *Mills v. Habluetzel*, 456 U.S. 91, 98 (1982).

In Pennsylvania, the blood tests have been held to be admissible only as "some evidence of paternity." *Turek v. Hardy*, 312 Pa.Super. 158, 458 A.2d 562 (1983). *Mills* makes clear the continued importance of the more traditional types of evidence in contested paternity cases. This type of evidence has been described time and time again as problematic. In *Little v. Streater*, 452 U.S. 1 (1981), this Court cited with approval an earlier opinion of Justice Brennan while he was a member of the New Jersey Superior Court:

> "[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence, or worse, induce deliberate falsity." 452 U.S. 1, 9 (1981).

In the same portion of the opinion, the Court noted with approval a statement from a legal journal that the testimony of a party is of questionable reliability and they are seldom accurate or reliable eyewitnesses. *Id.*, 452 U.S. at 8.

The third *Mathews* factor is the government's interest in the chosen standard of proof. The government has no reasonable interest in avoiding the use of the intermediate standard of proof in paternity cases. The use of a higher standard of proof imposes no costs or burdens beyond that which already exist. A heightened burden of proof will not require additional hearings or expense and will not slow down the determination of the issues raised.

This Court is not being asked to create a new burden of proof requiring substantial federal intervention into the operation of paternity hearings. As described in the opinion of the Supreme Court of Pennsylvania, the clear and convincing standard is already well established. *Minnich v. Rivera*, 509 Pa. 588, 595 (1986). Throughout

the United States, a clear and convincing standard of proof is employed in numerous forms of civil actions. 9 *Wigmore, Evidence* Section 2498.

In Pennsylvania "clear and convincing" evidence is required to prove *inter alia:* a change of domicile, *McKenna v. McKenna*, 282 Pa.Super. 45, 422 A.2d 668 (1980); a claim for wages for personal services to a decedent, *Mooney's Estate*, 328 Pa. 273, 194 Atl. 893 (1937); fraud, *Gilberti v. Coraopolis Trust Company*, 342 Pa. 161, 19 A.2d 408 (1941); entitlement to reformation of a contract on grounds of mistake, *Boyertown National Bank v. Hartman*, 147 Pa. 558, 23 Atl. 842 (1892); entitlement to a resulting trust, *Hale v. Stirling*, 369 Pa. 336, 85 A.2d 849 (1952); title by adverse possession, *Stevenson v. Stine*, 412 Pa. 478, 195 A.2d 268 (1963); facts necessary to overcome the presumption of a gift, *Butler v. Butler*, 464 Pa. 522, 347 A.2d 477 (1975); and incompetency sufficient to cause rescission of a transaction, *Elliott v. Clausen*, 416 Pa. 34, 204 A.2d 272 (1964). The meaning of the clear and convincing standard of proof recently was analyzed by the Pennsylvania Supreme Court in *In Re: Adoption of J.J.*, _____ Pa. _____, 515 A.2d 883 (1986). There, although the basis for employing the clear and convincing evidence was set in the federal constitution, the court disposed of the matter on state law grounds regarding the meaning of clear and convincing evidence. In all of the listed cases, the magnitude of the interest implicated does not rise to the magnitude of the parent-child relationship.

C. The deficiency of the burden of proof provided by statute is not cured by the statutory scheme for a determination of paternity.

The determination of paternity in the context of a support action is governed by 23 Pa.C.S. §4341 *et seq.* and Pennsylvania Rules of Civil Procedure 1910.1 *et seq.* An action for support is commenced by filing a complaint with the Domestic Relations Section of the Court of Common Pleas. Pa.R.Civ.P. 1910.4. An office conference is scheduled by court order. Pa.R.Civ.P. 1910(c). Service is made by mail. Pa.R.Civ.P. 411. At the support conference before a Domestic Relations officer the defendant may deny paternity. Pa.R.Civ.P. 1910.15(b) provides:

> "If the reputed father does not execute an acknowledgment of paternity, the domestic relations officer shall terminate the conference. He shall advise the parties that there will be a trial without jury on the issue of paternity unless within ten days after the conference either party demands a trial by jury as provided by Rule 1910.28(b)."

The Pa.R.Civ.P. 1910.28(b) notice is set out in its entirety in the Joint Appendix, pages 6-8.

In *Corra v. Coll*, 305 Pa.Super. 179, 451 A.2d 480 (1982), the Pennsylvania Superior Court held that an indigent defendant in a paternity action is entitled to a free lawyer. *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981), requires that the state provide indigent paternity defendants with blood tests without prepayment of the costs attendant thereto.

The putative father/defendant is prohibited in Pennsylvania by rule of court, from engaging in any pre-trial discovery, unless he can obtain a special order of court. Pa.R.Civ.P. 1910.9.

The plaintiff in paternity actions is represented by the District Attorney. 23 Pa.C.S. §4306 (Supp. 1986).

The federal government has assumed a substantial role with regard to child support under 42 U.S.C. §601 *et seq.*, Title IV—Part D of the Social Security Act, entitled Child Support and Establishment of Paternity. This is popularly known as "the IV-D Program." By legislative act, the federal government is substantially involved with each and every facet of obtaining and enforcing support orders. The federal government provides substantial funds, information, and technical assistance to the states, all of which is conditioned upon meeting a complex system of requirements. The IV-D Program regulations are found at 45 C.F.R. §301 *et seq.*

In *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the majority decision explicitly rejected analysis of the burden of proof in proceedings for termination of parental rights in the context of the complete statutory scheme therefor:

> "For this reason, we reject the suggestions of respondent and the dissent that the constitutionality of New York's statutory procedures must be evaluated as a 'package.' Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the 'cumulative effect' of state procedures .... The statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts." 455 U.S. at 757 n.9.

In the instant case, examination of the " 'cumulative effect' of state procedures" for determination of paternity supports employment of the clear and

convincing standard. The paternity proceeding at issue in the instant case is resolved in one hearing. Unlike the termination proceedings fully described in the *Santosky* dissent, there is no lengthy review, investigation and continuing judicial review. The entire determination rises or falls on one hearing. Even with counsel, the defendant is presented with two kinds of problematical evidence. The first, blood tests, provides the results of matching blood characteristics of the mother, child and putative father. Those results are then manipulated statistically.

> "The proper evidentiary weight to be given to these techniques is still a matter of academic dispute." *Mills v. Habluetzel*, 456 U.S. 91, 98 n.4 (1982).

In Pennsylvania, the blood tests have been held to be admissible as only "some evidence of paternity." *Turek v. Hardy*, 312 Pa.Super. 158, 458 A.2d 562 (1983).

The second kind of evidence also is difficult for the factfinder to evaluate:

> "[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity." *Cortese v. Cortese*, 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950), as quoted in *Little v. Streater*, 452 U.S. 1, 8, 68 L.Ed.2d 672, 634 (1981).

Since a determination of paternity cannot be relitigated in Pennsylvania (*Norris v. Beck*, 282 Pa.Super. 420, 422 A.2d 1363 (1980)), it is doubly important that the primary functions of the burden of proof, as noted in both the majority and the dissenting opinions in *Santosky v. Kramer*, be served. The *Santosky* dissent states:

> "[The] standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erroneous decisions.' " 455 U.S. at 785.

The majority opinion of the Court states:

> "But only the standard of proof 'instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions' he draws from that information." 455 U.S. at 757 n.9.

X. Conclusion

The decision of the trial court awarding Appellants a new trial at which the Plaintiff's burden of proof would be by clear and convincing evidence should be reinstated.

Respectfully submitted,

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Pennsylvania Standard Jury Instructions (Civil) at Section 5.50

5.50

5.50 (Civ) BURDEN OF PROOF

In civil cases such as this one, the plaintiff has the burden of proving those contentions which entitle him to relief.

When a party has the burden of proof on a particular issue, his contention on that issue must be established by a fair preponderance of the evidence. The evidence establishes a contention by a fair preponderance of the evidence if you are persuaded that it is more probably accurate and true than not.

To put it another way, think, if you will, of an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the plaintiff; onto the other, place all of the evidence favorable to the defendant. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly or to the slightest degree, in favor of the plaintiff, your verdict must be for the plaintiff. If the scales tip in favor of the defendant, or are equally balanced, your verdict must be for the defendant.

In this case, the plaintiff has the burden of proving the following propositions: [in the ordinary negligence case:] that the defendant was negligent, and that that negligence was a substantial factor in bringing about the accident. [In other cases, the contentions should be listed seriatim.] If, after considering all of the evidence, you feel persuaded that these propositions are more probably true than not true, your verdict must be for the plaintiff. Otherwise, your verdict should be for the defendant.

SUBCOMMITTEE NOTE

Although the plaintiff has the burden of proving his case against the defendant, the defendant has the burden of proving all affirmative defenses. E.g., contributory negligence, see note to Section 3.03. It is error for a trial judge to charge a jury that the plaintiff is obliged to show a case which is free from contributory negligence because of the burden of proof which the defendant has of establishing this affirmative defense. *Brown v. Jones*, 404 Pa. 513, 172 A.2d 831 (1961).

Date of Last Revision
March 1980

(5)

NO. 86-98

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

Gregory L. Rivera,
Appellant

V.

Jean Marie Minnich,
Appellee

On Appeal From The
Supreme Court Of Pennsylvania

BRIEF FOR APPELLEE

Mary Louise Barton
Assistant District Attorney

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QUESTION PRESENTED

Does the Pennsylvania statute which permits paternity to be determined only by a "preponderance of the evidence" violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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STATEMENT OF THE CASE

I. Course Of Proceedings

This is an appeal from a decision of the Supreme Court of Pennsylvania which held that the preponderance standard of proof statutorily required in Pennsylvania, 42 Pa.C.S.A. 6704(g), for paternity proceedings does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. U.S. Const. Amend. XIV §1.

On May 28, 1983, Jean Marie Minnich, Respondent, gave birth to a baby boy, Cory Michael Minnich. Miss Minnich was unwed at the time the baby was born. In an effort to obtain support for her child, on June 17, 1983, Miss Minnich brought a paternity action against Gregory L. "Pete" Rivera, Petitioner, in the Court of Common Pleas of Lancaster County, Pennsylvania. Miss Minnich and the child were recipients of Public Assistance. Miss Minnich was requested to disclose the name of the child's father in order to secure

support for the child from his parent. This disclosure is fostered by 42 U.S.C. §654-(4) [42 U.S.C.S. § 654-(4)] which directs states to establish paternity when possible in order to reduce substantial outlays of taxpayers' money used to support children born out-of-wedlock. All parties were given proper notice and a support hearing was held before a domestic relations hearing officer on August 29, 1983. Neither party was represented by counsel. Mr. Rivera denied paternity of Cory Michael Minnich at the hearing. Due to the denial, Miss Minnich petitioned the Court for blood tests. Her petition was granted. All parties appeared for blood tests on October 31, 1983. The results of the blood test were received on November 21, 1983. The results showed a 94.60 percent probability of paternity via human leukocyte antigen blood groupings.

Another hearing was scheduled for March 20, 1984. Proper notice was given to

all parties. The hearing of March 20, 1984, was held before a domestic relations hearing officer. Mr. Rivera was represented by counsel. Miss Minnich was not represented by counsel. Mr. Rivera demanded a jury trial to which he was no longer entitled. Under Pennsylvania law, a defendant has ten (10) days after he signs a paternity denial to demand a jury trial, otherwise a bench trial is held. The Court was petitioned to allow Mr. Rivera to have a jury trial and the petition was granted on April 4, 1984. Between April 4 and April 24, 1984, a pre-trial conference was held and Mr. Rivera's motion for discovery was granted. Pre-trial, Mr. Rivera submitted a jury instruction which called for the clear and convincing evidentiary standard to be used. Mr. Rivera reasoned that the Pennsylvania statute requiring the preponderance standard at paternity trials was unconstitutional in that it violated his due process rights via the Fourteenth

Amendment of the United States Constitution. Mr. Rivera's jury instruction was denied.

A civil jury trial was held on April 24, 1984. The evidence presented at the trial was direct testimony from Jean Marie Minnich (Respondent); Mary Minnich (Respondent's sister); Jeanette Bowers (Deputy Director of the Domestic Relations Division of the Court of Common Pleas of Lancaster County, Pennsylvania); Harold Lehman (Roche Bio-Medical Laboratories); G. Lynn Ryals, Ph.D. (Director of Roche Bio-Medical Laboratories); Christopher Rivera (Petitioner's brother); Gregory L. Rivera (Petitioner); and Marie Rivera (Petitioner's sister). The child, Cory Michael Minnich, was called as a witness as evidence of the physical resemblance between the child and his father, Gregory L. Rivera. The child's birth certificate was admitted into evidence. The child's father's name was recorded as "Pete" Rivera, the name by

which the child's mother knew Gregory L. Rivera (Petitioner).

The jury found unanimously for Jean Marie Minnich that Gregory L. Rivera was the father of Cory Michael Minnich.

On May 7, 1984, Mr. Rivera filed a motion for a new trial on the grounds that the clear and convincing standard was improperly denied. Mr. Rivera's motion for a new trial was granted on October 19, 1984. The lower court's opinion was appealed directly to the Supreme Court of Pennsylvania. On March 21, 1986, the Supreme Court of Pennsylvania reversed the lower court's decision holding that the child's rights were central in a paternity proceeding and increasing the burden of proof to clear and convincing unduly risked depriving the child of those rights. This appeal followed.

STATEMENT OF THE CASE

II. Statement Of Facts

The evidence presented at trial proved the following. On May 28, 1983, Jean Marie Minnich gave birth to a son Cory Michael Minnich. (T.R. 21). Miss Minnich was 16 years old and unwed at the time. The child was conceived in the summer of 1982 while the mother was 15 years old. (T.R. 30). The child's father, Gregory L. "Pete" Rivera (Petitioner) was employed in the small town Miss Minnich resided. (T.R. 19, 55). Mr. Rivera, 23 and married, admitted having intercourse with the child's mother during the summer of 1982. (T.R. 55, 59). The child's mother met Mr. Rivera one summer evening as she and her sister were walking to a local store. (T.R. 22, 43, 45, 56). They passed a cafe across the street from the parking lot of Mr. Rivera's place of employment. Mr. Rivera was outside the cafe on his break and called to the sisters to

stop as they passed. They stopped and talked. (T.R. 22). After that initial meeting, Mr. Rivera and the child's mother had sexual intercourse two (2) or three (3) times in Mr. Rivera's van which was parked at his place of employment. (T.R. 23, 24, 40, 41). The child's mother had no other sexual relationships. (T.R. 25, 32, 59). Miss Minnich discovered she was pregnant at the end of August of 1982. (T.R. 19). She did not want anyone to know she was pregnant. (T.R. 25, 28). She did not go to a doctor until she was seven (7) months pregnant. (T.R. 25). Cory Michael Minnich was born May 28, 1983. (T.R. 21). His mother named Gregory L. "Pete" Rivera as the child's father on his birth certificate. (T.R. 21, 55). The mother applied for Public Assistance for herself and the child. (T.R. 28). She was required to identify the child's father. She identified Mr. Rivera and the paternity suit was instituted. Mr. Rivera has seen his

son two (2) times in the child's life -- when the blood tests were given and at the time of trial. (T.R. 27, 30).

SUMMARY OF THE ARGUMENT

I. The fundamental liberty interest of natural parents in the care, custody, and management of their child is particularly important and more substantial than money. Santosky v. Kramer, 445 U.S. 745 (1982). Once this Court has identified a fundamental liberty interest, it has mandated an intermediate standard of proof -- "clear and convincing evidence" to preserve fundamental fairness in a variety of proceedings (usually government initiated) that threaten the individual with deprivation of this fundamental liberty interest.

The difference in the parent/child relationship that was implicated in Santosky v. Kramer, 445 U.S. 745, and the lack of parent/child relationship in this case is clear and significant. The mere existence of a biological link does not merit equivalent constitutional protection.

Lehr v. Robertson, 463 U.S. 248, 261 (1983).

The importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, in promoting a way of life not just the fact of blood relationship. It is the coming forward to participate in the rearing of one's child that is granted extra constitutional protection not the spurning of one's child.

II. The Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process of law. When that Clause is invoked in a novel context an inquiry into the interests involved must be begun. Only after the interests have been identified can the adequacy of the State's process be evaluated. Mathews v. Eldridge, 424 U.S. 319 (1976).

When the interests of the child and mother in having the father held responsible

for some parent/child relationship, albeit it a financial one, are balanced against the interests of the father who wants nothing to do with a parent/child relationship, it cannot be said that the father's interest is paramount to the child's as to require that the risk of error be further allocated to the child's side. The child's interest in identifying a parent is paramount.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of the infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

The interests of the state are also substantial. The public welfare dimensions of illegitimacy have become alarming. A recent estimate of 1985 Aid to Families with

Dependent Children suggests that total welfare expenditures attributable to teenage childbearing has doubled in the past ten (10) years to $16.6 billion. A conservative estimate of the number of unwed teenagers who give birth is 50 percent. Another estimate goes as high as 90 percent being unwed. Either way, it is obvious that a substantial portion of the AFDC outlays are attributable to children born out-of-wedlock to teenage mothers. "Risking The Future: Adolescent Sexuality, Pregnancy and Child-bearing", National Academy of Science, V. I, p. 133, 1987.

Having identified the interests, the state's process is clearly adequate. Paternity proceedings in Pennsylvania afford putative fathers the right to be heard and the right to notice, the two (2) basic components of due process. The right to a trial by a jury of one's peers or by a judge is granted by statute. 42 Pa.C.S.A. 6704(g).

Representation by counsel is assured by case law. Corra v. Coll, 305 Pa. Super. 179 (1982). Access to blood tests is assured by both statute and case law. Little v. Streater, 452 U.S. 1 (1981); Turek v. Hardy, 312 Pa. Super. 158 (1983); 42 Pa.C.S.A. 6131 et seq.

Petitioner has been afforded a panoply of due process rights and still clamors for one more. To increase the burden of proof to clear and convincing presents the child with an almost insurmountable burden of proof. The use of this evidentiary standard in a paternity proceeding creates an almost impenetrable barrier that works to shield otherwise invidious discrimination against an illegitimate child. This Court's holding in Gomez v. Perez, 409 U.S. 535, 538 (1973) prohibits this.

ARGUMENT

I. THERE IS NO VIOLATION OF THE DUE PROCESS CLAUSE. THE RIGHTS AFFORDED AN ESTABLISHED PARENT/CHILD RELATIONSHIP ARE NOT THE SAME RIGHTS AFFORDED A PARENT WHO SPURNS A PARENT/CHILD RELATIONSHIP.

Petitioner claims his non-interest in a parent/child relationship warrants the same constitutional protection as an already established parent/child relationship. Petitioner incorrectly compares himself to the wed parents in Santosky v. Kramer, 455 U.S. 745 (1982), the unwed father in Stanley v. Illinois, 405 U.S. 645 (1972), and the unwed father in Caban v. Mohammed, 441 U.S. 380 (1979).

A closer examination of the facts and the case law clearly demonstrates that Petitioner correctly belongs in the category of unwed parents who never chose a commitment to parental responsibilities and were found undeserving of substantial protection under

the Due Process Clause. Quilloin v. Walcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248 (1983).

The difference in the case at bar and Santosky v. Kramer, 455 U.S. 745 (1982), is both clear and significant. The differences are public policy issues and procedural issues. The holding in Santosky stands for the public policy determination that the family unit is a fundamental institution of our society which is deserving of substantial constitutional protection. The procedural safeguards in Santosky were weak. The procedural safeguards in the case at bar are strong.

In Santosky v. Kramer, 455 U.S. 745 (1982), this Court held that the clear and convincing standard of proof was constitutionally required when a state sought to destroy an already established family unit by separating parents from children. "The fundamental liberty interest of natural parents in the care, custody, and management

of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in presenting the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention in the ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." at 455 U.S. 753, 754. The already formed family unit is clearly a fundamental liberty interest deserving of extra constitutional protection. The spurning of one's child clearly is not.

The public policy difference in the case at bar and Santosky v. Kramer, 455 U.S. 745 (1982), is both clear and significant. The Santoskys were a family -- physically,

emotionally and legally. They demonstrated a commitment, albeit an imperfect one, to the responsibilities of parenthood. They participated in the rearing of their children and formed one of, if not the most fundamental institution in our society -- a family. This interest in loving and caring for their children has substantial protection under the Due Process Clause.

Gregory L. Rivera, Petitioner, has never acted as a parent to Cory Michael Minnich. In fact, Mr. Rivera comes before the Court asking the Court to endorse a policy that will make it more difficult for a child born to him out-of-wedlock to ever know Mr. Rivera as a parent. Mr. Rivera, by choice, has never had any custodial, personal or financial relationship with his son.

The biological link that exists between Mr. Rivera and Cory Michael Minnich does not merit the same constitutional protection as the parent/child relationship

that existed between the Santoskys and their children. The biological link affords the natural father alone the opportunity to develop a relationship with his child. If the natural father does not grasp this opportunity and does not accept some responsibility for his child's future, the federal constitution does not compel a state to legislate a burden of proof that protects and condones such callous parental irresponsibility while causing the child an egregious loss.

The procedural differences are as clear as the public policy differences.

In Santosky, the state pitted itself against the family. The familial unit was already formed including the emotional bonds associated with a family unit. The state sought to separate the child from the parents. In the case at bar, the father, not the state, stands as the adversary to his own child.

In Santosky, the resources of the state were greater than the resources of the parents. This is not true of a paternity proceeding. The mother is the plaintiff on behalf of the child. She may be represented by private counsel. If she is indigent, she may be represented by the state through the District Attorney's Office. 42 Pa.C.S.A. 6711. Likewise, the father can retain private counsel. If the father is indigent, he is eligible for representation by a public defender. Corra v. Coll, 305 Pa. Super. 179, 451 A.2d 480 [illegible] 82). Petitioner is represented by a solo private practitioner and by a member of the largest civil law firm in Lancaster County, Pennsylvania. The mother is represented by one assistant district attorney whose job responsibilities require that she allocate 98 percent of her time litigating, with a speciality in physical and sexual child abuse. Both parties had access to

blood tests. Little v. Streater, 452 U.S. 1 (1981); 42 Pa.C.S.A. 6133. A full series of exclusionary and inclusionary blood tests were done by order of the Court. The human leukocyte antigen results showed a 94.60 percent probability of paternity. An expert witness testified as to the blood tests results at the time of trial on behalf of the mother and child.

In Santosky, a complex series of encounters between a social service agency, the parents and the child were presented to a judge to determine whether the children should be taken from the parents. By its very nature, a termination proceeding leaves an extremely important decision open to the subjective values of one human being, the judge. As this Court mentioned in Santosky, most families involved in termination proceedings come from lower socio-economic levels. This makes termination proceedings more vulnerable to judgments based on cultural

or class bias.

Parties to paternity actions come from all walks of life. Mr. Rivera was gainfully employed and had been for a number of years at the time the paternity suit was brought. Miss Minnich was a welfare recipient. Parties to paternity suits come from all social classes, educational levels and racial groups which means the proceedings are no more vulnerable to judgments based on cultural or class bias than any other legal proceeding or human activity. Furthermore, Mr. Rivera was judged by 12 members of the community who sat as jurors and had testimonial evidence along with the scientific blood tests results presented to them.

Stanley v. Illinois, 405 U.S. 645 (1972) stands for the protection of the rights of responsible, unwed fathers. The unwed father in this case was the unwed father of the children involved who lived with and supported the children all their

lives. The state statute challenged here sought to automatically take the children from the father at the death of the mother since the state statute specified that an unwed father was not a parent. The state presumed an unwed father was unfit and did not even grant him the right to a hearing to prove he was a fit parent. This unwed father challenged the statute under the Due Process and Equal Protection Clauses. This Court determined that the unwed father had a fundamental liberty interest in this already nurtured and established parent/child relationship. He was, therefore, to be guaranteed the due process rights that would protect his interest in retaining custody of his children. The state statute was declared unconstitutional in that a hearing was not provided the unwed father when the issue at stake was the dismemberment of his family.

In Caban v. Mohammed, 441 U.S. 380 (1979), this Court again recognized a responsible, unwed father's constitutionally protected interest in his parent/child relationship. The unwed father had lived with the children and the mother for several years. The unwed father's name was on the birth certificates. The unwed father frequently saw and maintained contact with the children. Caban sought to prevent the adoption of his natural children by the children's step-father. However, the state in which he resided allowed only natural mothers to veto the adoption of natural children. Caban claimed this statute violated the Equal Protection Clause of the Fourteenth Amendment. This Court agreed due to the already established parent/child relationship.

Petitioner properly belongs in that category of parent who never chose a commitment to parental responsibilities and

were found undeserving of substantial protection under the Due Process Clause. Quilloin v. Walcott, 434 U.S. 246 (1978); Lehr v. Robertson, 463 U.S. 248 (1983).

Leon Quilloin fathered a child in 1964. That child was in the custody and control of her mother for her entire life. Her biological father and mother never married or established a home together. The father did permit the mother to use his name on the child's birth certificate. He had contact with the child and gave the child gifts. In 1967, the mother married someone other than the child's father. In 1976, the child's step-father expressed a desire to adopt the child. After receiving notice and a hearing, Leon Quilloin attempted to block the adoption and then secure visitation rights. Quilloin did not seek custody of the child or object to her living with her mother and step-father.

In the state in which the parties

resided, a biological father who has not legitimized a child could not veto the adoption of that child. Quilloin challenged this statute on due process and equal protection grounds. This Court unanimously made it clear that an unwed father who has never shouldered or sought any significant responsibility with respect to the daily supervision, education, protection or care of his child is not entitled to the same constitutional protections as an unwed father who had by choice been in a substantial way a member of the child's family unit, defacto or otherwise. This Court made it quite clear that the Due Process Clause would be offended if the state was attempting to destroy a family unit, but that such was not the case under these facts. In fact, this Court acknowledged the state's strong interest and even went so far to say that the child's and the state's interests in creating and preserving a family unit were more substantial

than the unwed father's interest since it was not the "cognizable and substantial" interest of companionship, care, custody and management "of his child". Quilloin v. Walcott, 434 U.S. 246 (1978).

In Cory Michael Minnich's lifetime, Petitioner has never expressed one scintilla of interest in the "companionship, care, custody and management" of the child. The only interest ever expressed was the interest not to be deprived of the money Petitioner was found to owe to the child as a duty of support. Surely this interest does not deserve extra constitutional protection under the guise of due process.

Similarly, in Lehr v. Robertson, 463 U.S. 248 (1983), an unwed father claimed his due process rights were violated because he never received notice and did not have the opportunity to be heard before his biological child was adopted. This Court analyzed the constitutional protection due an unwed,

biological father's inchoate relationship with a two (2) year old child he never supported and rarely saw. The facts are somewhat similar to Quilloin, 434 U.S. 246, in that the unmarried father objected to not receiving notice and the opportunity to be heard prior to the adoption of his child by her step-father. The biological father contended that his interest in an actual or potential relationship with a child born out-of-wedlock was a liberty interest which could not be destroyed without due process of law, i.e. prior notice and the opportunity to be heard before he was deprived of that interest.

This Court began with an analysis of the parent/child relationship. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they

are sufficiently vital to merit constitutional protection in appropriate cases. Lehr was not one of the appropriate cases. The Court found that there was a clear and significant distinction between a mere biological relationship and an actual relationship of parental responsibility. As Justice Stewart stated in Caban v. Mohammed, 441 U.S. 397, "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." This Court has consistently held that only when a biological, unwed father demonstrates a free commitment to parental responsibilities by coming forward to participate in his child's life does that father's interest in personal contact acquire

substantial protection under the Due Process Clause. Jonathan Lehr did not demonstrate such a commitment. Neither did Gregory L. "Pete" Rivera, Petitioner.

II. IN THE ALTERNATIVE, AN ANALYSIS OF THE DUE PROCESS REQUIREMENTS VIA MATHEWS V. ELDRIDGE DEMONSTRATES THAT THE INTERESTS OF JUSTICE DEMAND A NEAR ALLOCATION OF RISK BETWEEN THE CHILD, THE FATHER, THE MOTHER AND THE STATE.

The preponderance of the evidence standard specified by the Pennsylvania Legislature does not violate the due process Clause of the Fourteenth Amendment of the United States Constitution. U.S. Const. Amend. XIV, Section 1. The Due Process analysis requires consideration of three (3) distinct factors. First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, third, the governments's interest, including the function involved and the fiscal and

administrative evidence that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319 (1976).

A. THE CHILD'S INTERESTS ARE PARAMOUNT IN A PATERNITY PROCEEDING. TO SUBJECT THE CHILD'S COMMANDING INTERESTS TO THE CLEAR AND CONVINCING STANDARD IS TO HOLD THE CHILD RESPONSIBLE FOR THE IRRESPONSIBLE LIAISON OF THE UNWED PARENTS. VISITING THIS CONDEMNATION UPON THE HEAD OF THE INFANT IS ILLOGICAL AND UNJUST.

The establishment of the parent/child relationship is the most fundamental right a child possesses. It is to be equated with personal liberty and the most basic constitutional rights.

The preponderance of evidence standard used in a civil paternity suit satisfies due process for two (2) main reasons. First, it fairly protects the interests of all the parties involved.

Second, it expresses basic public policy that affirms the family's effectiveness as a social institution. Increasing the evidentiary standard puts an unjust and illogical burden on the child. In fact, increasing the standard of proof raises the impenetrable barrier that works to shield otherwise invidious discrimination against the child. Gomez v. Perez, 409 U.S. 535, 538 (1973).

Since 1968, this Court has consistently held that children born out-of-wedlock are as deserving of the equal protection of our laws as any other person. These cases ended a long history of treating children born out-of-wedlock as nonpersons. Levi v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guardian and Liability Insurance Company, 391 U.S. 73 (1968); Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972); Dairs v. Richardson, 342 F. Supp. 588 (D. Comm.), affirmed,

409 U.S. 1069 (1972); Gomez v. Perez, 409 U.S. 535 (1973); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Jimenez v. Weinberger, 417 U.S. 628 (1974); Trimble v. Gordon, 430 U.S. 762 (1977); United States v. Clark, 445 U.S. 23 (1980); Mills v. Habluetzel, 456 U.S. 91 (1982).

The result of these cases was to insure that children born out-of-wedlock receive: recovery under a wrongful death statute following death of a mother; workman's compensation; Social Security benefits; paternal support; inheritance through intestate succession; survivor's benefits under the Civil Service Retirement Act; and a fair statute of limitations in which paternity actions may be filed.

The importance of these legal rights to the child cannot be understated. However, the child's right to know the identification of both parents is even more profoundly fundamental. What a child knows

and imagines about his or her biological family helps to mold the child's self-perception. This parental identification provides the child with a sense of identity and roots. The child will possess similar personality traits and health problems as his or her parents. Biological parents, even when they choose to be anonymous, inadequate and uncaring, continue to be significant in a child's development.

An illegitimate child's right to and need of a legal relationship with his or her father is unquestionable. The child has a more weighty right to know and obtain support from his or her father. Irresponsible, unwed fathers do not have a fundamental right to evade this most elementary of human obligations - parental responsibility. The societal value that the primary obligation of child raising falls to the parent not the state is reflected in the state's recognition that the interests of the

parties in a paternity suit are equal thereby requiring the preponderance of evidence standard to prove paternity.

B. THE INTERESTS OF THE FATHER ARE PURELY MONETARY. IN FACT, MONEY IS THE ONLY THING THE COURT CAN DEMAND FROM AN UNCARING PARENT. THE LOVE A PARENT HAS FOR A CHILD COMES FROM A CHOSEN RELATIONSHIP, NOT A COURT ORDER.

The issue for the father is one of shifting economic interests. The only thing asked of Petitioner is financial support for his child. Petitioner's brief makes it very clear that his property interests are jeopardized and lists them all very succinctly. There is no need for Respondent to repeat these property interests and concedes that Petitioner has these property interests. The United States Constitution does not now and never has stood for the premise that a parent's property rights deserve more due process rights than the

rights of his illegitimate child.

Petitioner claims his liberty interests are jeopardized when he is found to be the father of a child born out-of-wedlock. As in any civil proceeding, one who willfully disobeys a court order can be held in contempt. Petitioner's chances of being held in contempt and thereby deprived of his liberty are small. First, it must be found that Petitioner's failure to pay child support was willful. There must be a hearing scheduled before a judge. Petitioner must be given proper notice of the hearing. Should it be found that Petitioner has willfully not paid child support, he may be held in contempt. Petitioner carries the keys to the prison in his pocket. Every contempt order must state a purge amount. 42 Pa.C.S.A. 6708; 23 Pa.C.S.A. 4345 (supp. 86). Furthermore, should Petitioner be indigent, he cannot be held in contempt of

court. Wright v. Hendrick, 455 Pa. 36, 312 A.2d 402 (1973). To argue that his liberty interest is substantial in a contempt proceeding thereby requiring the clear and convincing standard pales to the liberty interest at stake during criminal sentencing where only a preponderance standard is constitutionally required to impose a mandatory five (5) year prison sentence. McMillan v. Pennsylvania, 477 U.S. ____, 106 S.Ct. ____, 91 L.Ed.2d 67 (1986).

Petitioner claims a potential for criminal liability. Effective June 27, 1978, the Pennsylvania Civil Procedure Support Law abolished the right to a criminal proceeding on the issue of paternity. Act No. 1978-46, P.L. 106, amending the Act of July 13, 1953, P.L. 431. The 1978 amendment clearly expresses the legislature's intent to make determination of support for children born out-of-wedlock purely a civil action. The legislature also expressly provided that

the burden of proof be a preponderance of the evidence. 42 Pa.C.S.A. 6701, et seq.

Petitioner also claims the potential for the deprivation of liberty under the Pennsylvania Crimes Code, Endangering the Welfare of Children, 18 Pa.C.S.A. 4303. Pennsylvania case law makes it clear that this statute is used only where a child has been sexually or physically assaulted, physically abandoned or otherwise put at bodily risk.

C. THE INTERESTS OF THE MOTHER ARE THOSE OF A RESPONSIBLE PARENT. SHE WANTS FINANCIAL SUPPORT FOR THE CHILD ALONG WITH THE SENSE OF DIGNITY OF KNOWING SOCIETY HAS RECOGNIZED THE FATHER AS WELL AS THE MOTHER OF THE CHILD.

The mother assumes the primary responsibility for support - emotional, physical and financial - for her illegitimate child. Because she assumes these responsibilities, she has a keen interest

in receiving help from the child's biological father in raising and caring for the child.

The mother or the state takes responsibility for the childbirth expenses. The mother experiences a birth-related loss of income. The disapproval of family and community is felt by the mother. Emotional strain and confusion often accompany the birth of an illegitimate child. The mother of an illegitimate child is often a minor. This means school is interrupted or denied and that marketable skills are not acquired. Low educational attainment results in marginal or no employment which means poverty-level existence for the mother and the child.

> According to the 1983 Current Population Survey on Child Support and Alimony conducted by the Census Bureau, 8.7 million women were caring for children whose fathers were absent from the home. Only 58 percent of them had court orders or agreements to receive child support and even of this relatively fortunate group who

were actually supposed to receive payments in 1983, half received just partial payment or no payment at all during the course of the year. The unpaid child support bill for 1983 alone: $3 billion. Moreover, the average amount of child support received by a family in 1983 was only $2,341. "These figures," said former HHS Secretary Margaret M. Heckler, "Document a widespread and shameful situation in our country - the nonsupport of children by their own parents." One half of marriages that took place in the 1970's will end in divorce. Out-of-wedlock births as a proportion of live births climbed from less than 11 percent in 1970 to about 20 percent in 1982. As a result, the plight of the single-parent family - 90 percent of them headed by women - has become a familiar feature on the landscape of American society. The median annual income of female-headed families in 1983 was $12,800 and fully one-third of these families were poor. The brunt of this poverty falls on the children. The Census Bureau found that in 1983, 55 percent of children living in female-headed households were poor - four times the rate for children in other households. Clearly, the financial abandonment of children by one parent contributes significantly to their poverty.

"A Decade of Child Support Enforcement 1975-1985", Volume I, U.S. Department of Health and Human Services, Office of Child Support Enforcement, Tenth Annual Report to Congress for the Period Ending September 30, 1985, page 1.

D. THE INTERESTS OF THE STATE ARE NOT PARAMOUNT TO THE CHILD'S INTERESTS. HOWEVER, THE STATE'S INTERESTS ARE SUBSTANTIAL. THE STATE'S INTEREST IN LEGISLATING MATTERS RELATED TO FAMILIES IS STRONG. THE STATE HAS A STRONG INTEREST IN THE PARENTS TAKING FINANCIAL RESPONSIBILITY FOR THEIR CHILDREN. THE STATE'S MONETARY BURDEN FOR THE DAILY LIVING COSTS OF CHILDREN BORN OUT-OF-WEDLOCK IS EXTRAORDINARY AND INCREASING.

The function of a legislative body elected by the people has long been held to be primary. The legislative role has been fortified by the presumption of right and legality. A legislative decision is not to be interfered with lightly by any judicial concept of wisdom or propriety. Weems v. United States, 217 U.S 49, 379 (1910).

Notably, the interests of states in family related matters has been well respected by the Court in both theory and precedent. United States v. Yanzell, 382 U.S. 341 (1966).

In 1978, the General Assembly of Pennsylvania repealed Section 4323 of the Crimes Code, 18 Pa.C.S.A. §4323, related to neglect to support an illegitimate child, and amended the Civil Procedural Support Law to make paternity a civil action in accordance with the Rules of Civil Procedure. The General Assembly specifically chose the preponderance of evidence standard as the applicable burden of proof. 42 Pa.C.S.A. §6704(g). The decisions of the General Assembly should be given serious weight in the Court's analysis of interests in its application of due process principles. As this Court held in Missouri, Kansas and Texas R. Co. v. May, 194 U.S. 267 (1904),

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

This Court is required to correct clear constitutional violations in state statutes. Beyond this examination to ensure constitutional fairness, the Court's historic role in establishing standards of proof that states must follow in judicial proceedings is limited. After reviewing the competing interests at stake in the case at bar, especially the child's compelling interests, the Court will be able to decide that there is no due process violation in Pennsylvania's choice of the preponderance standard. The integrity of the Pennsylvania Legislature, as well as the legislatures of a majority (41) of the other 50 states who require the

the preponderance standard, and the integrity of the states' role in the federalist system of government should be respected. The state's choice to promote parent/child relationships, not prevent them, should be upheld by the Court.

Furthermore, the State has a strong interest in unwed fathers being held responsible for some or all of their children's financial support. Mothers of children born out-of-wedlock are more often than not forced to go on the welfare rolls after a child is born. This is especially true of teenage mothers who are unwed.

The State's concern is reflected in the Child Support Enforcement Amendments of 1984. 42 U.S.C. 1305. The purpose of the amendment is to assure that all children regardless of the circumstances will receive financial assistance from their parents. The amendment requires each state to increase its statute of limitations to 18 years for

paternity actions in order to alleviate the financial burden already placed on the state for assuming responsibility of financial support for children born out-of-wedlock.

Illegitimacy rates have increased in alarming proportions. Out-of-wedlock births climbed from less than 11 percent in 1970 to about 20 percent in 1982. "A Decade of Child Support Enforcement 1975-1985," U.S. Department of Health and Human Services, Office of Child Support Enforcement, Volume I, page 1. In 1983, the National Center for Health Statistics reports that 737,893 children were born out-of-wedlock in the United States. In 1984, the numbers increased by 4 percent to 770,353. Estimates are that the number of children born out-of-wedlock rose to the highest level in 1984 since 1940. National Center for Health Statistics, Monthly Vital Statistics, Volume 35, #4 Supplement, July 18, 1986.

Of the 770,353 children born out-of-wedlock in 1984, it is estimated that 580,000 of the children were born to teenagers between the ages of 13-19. The financial impact of these figures is shown by the following:

> Teenagers who become mothers are disproportionately poor and dependent on public assistance for their economic support (Moore and Burt, 1982; Furstenberg, 1976; Presser, 1975). Estimates of welfare expenditures to adolescent mothers in 1975 suggest that approximately 50-56 percent of the Aid to Families with Dependent Children (AFDC) budget in that year was directed to households in which the mother was a teenager at the time her first child was born. These households accounted for approximately $5 billion in AFDC expenditures, when food stamp benefits were also considered, the total approached $6.5 billion (Moore, 1978; Moore et al., 1981). In addition, because AFDC recipients are also eligible for Medicaid benefits, the total rises by another $2.1 billion ($934 million for Medicaid services to the children of teenage mothers and $1.2 billion for adolescent mothers themselves) when health care costs are added. In all, Moore et al. (1981) estimated that more than $8.6 billion in

> public assistance through these three programs was provided to households in which the mother was an adolescent parent in 1975. A more recent estimate of 1985 outlays suggests that total welfare-related expenditures attributable to teenage child-bearing has nearly doubled in the past 10 years, to $16.6 billion: $8.3 billion for AFDC, $3.4 billion for food stamps, and $4.9 billion for Medicaid (Burt, 1986). As with the earlier estimate, the 1985 figure is conservative, since it includes only sums expended in the three major programs.

Risking the Future: Adolescent Sexuality, Pregnancy and Childbearing, Volume I, National Academy of Science, National Academy Press, 1987.

E. THE PROCESS AFFORDED PETITIONER IS MORE THAN ADEQUATE. TO INCREASE THE BURDEN OF PROOF TO THE INNOCENT CHILD'S DETRIMENT MEANS THAT THE CHILD IS THE PARTY WHO STANDS TO SUFFER AN ERRONEOUS DEPRIVATION AND AN EGREGIOUS LOSS.

The final prong of the due process analysis calls for a look at the legal

process that was afforded Petitioner. The final analysis also demands a look at the erroneous deprivation and egregious loss the process would cause.

The following analysis will show that the process afforded Petitioner was exceedingly generous and more than adequate to protect Petitioner's due process rights. The analysis will also show that the very language of the clear and convincing standard would present the child with a burden so unequal that the standard of proof would become an invidious barrier and a form of discrimination against the child. This discrimination is forbidden by Gomez v. Perez, 409 U.S. 535 (1973). Not only is the language a form of invidious discrimination, but the effect would be to erroneously, unjustly, deprive the child of the right to know a parent, surely an egregicus loss for the child.

The beauty of the Due Process Clause is its ultimate goal in assuring justice in our adversary legal system. It has long been the rule that the two (2) basic tenets of due process are the right to be heard and the right to notice. McVeegh v. United States, 78 U.S. (11 Wall) 259, 267 (1870). The due process rights accompanying the hearing component are the right to present evidence, Morgan v. United States, 304 U.S. 1, 18 (1938), and the right to confront and cross-examine witnesses. Green v. McElroy, 360 U.S. 474, 497 (1959). The procedural rights afforded Petitioner more than fulfill the due process requirements.

Petitioner was afforded the opportunity to be heard by way of a jury trial, representation by counsel, and access to blood tests.

The Pennsylvania civil support statute governing paternity proceedings afforded Petitioner the right to a bench

trial or a jury trial. 42 Pa.C.S.A. 6704(g). Petitioner chose a jury trial. The right to trial fulfilled the due process requirements of presenting evidence, confronting and cross-examining witnesses.

Petitioner was represented by privately retained counsel. Had Petitioner been indigent, he would have received a court appointed attorney. Corra v. Coll, 305 Pa. Super. 179, 451 A.2d 480 (1982). This right to counsel is not even afforded indigent parents at a parental termination hearing where a fundamental liberty interest - the family - can be destroyed. Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

Another procedural safeguard afforded Petitioner as a component of proper hearing was access to blood tests. The Court recognized the unique ability of blood test groupings to all but eliminate errors

in the proof of paternity. Little v. Streater, 452 U.S. 1 (1981). The Court's response in Little countered the risk created by a state's onerous evidentiary rule that a putative father's testimony alone was insufficient to overcome the mother's prima facie case. The putative father reasoned that he could not be properly "heard" without blood tests and this Court agreed. Pennsylvania does not have the same evidentiary rule. However, Pennsylvania has seen the wisdom in this Court's validation of the reliability of blood test groupings and afforded Petitioner access to blood tests. 42 Pa.C.S.A. 6133 et seq.; Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983).

The recognition of the probative value of blood test groupings came as a result of the release of joint American Medical Association-American Bar Association guidelines for serologic testing in paternity

cases. "Joint AMA-ABA Guidelines: Present States of Serologic Testing in Problems of Disputed Parentage", 10 Fam.L.Q. 247 (1976). The guidelines acknowledged that human leukocyte antigen tests were a powerful scientific tool for resolving paternity issues. Little v. Streater, 452 U.S. 1, 8; Mills v. Habluetzel, 456 U.S. 91, footnote 4.

Forty-nine states and the District of Columbia have statutes which recognize the relevance of blood tests and allow them to be used as evidence in paternity proceedings. The probative value of blood tests have been recognized by the appellate courts of many states as well. Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979); Tice v. Richardson, 7 Kan. App. 2d 509, 644 P.2d 490 (1982); Commonwealth v. Blazo, 10 Mass. App. 13, 406 N.E. 2d 1323 (1980); Hennepin County Welfare Board v. Ayers, 304 N.W. 2d 879 (1981); Malvasi v.

Malvasi, 167 N.J. Super. 513, 401 A.2d 279 (1979); Commissioner of Social Services v. Lardo, 100 Misc. 2d 220, 417 N.Y.S. 2d 665 (1979); Turek v. Hardy, 312 Pa. Super. 158, 458 A.2d 562 (1983).

The legal and medical recognition of the value of blood test groupings is indisputable and continues to grow. "Guidelines for Reporting Estimates of Probability of Paternity in Inclusion Probabilities in Parentage Testing." American Association of Blood Banks, 1983, Journal of the American Medical Association, Vol. 253, No. 22, June 14, 1985, p. 3298; Polesky and Lenty, "Parentage Testing: An Interface between Medicine and Law," North Dakota Law Review, Vol. 60:727 (1984); Page - Bright, "Proving Paternity - Human Leukocyte Antigen Test," Journal of Forensic Sciences, JFSCA, Vol. 27, No. 1, Jan. 1982, pp. 135-153; Houtz, Brooks, Wenk, and Dawson, "Utility of HLA and Six

Erythrocyte Antigen Systems in Excluding Paternity amoung 500 Disputed Cases," Forensic Science International, 17 (1981), pp. 211-218; Strond and Galindo, "Paternity Exclusion by HLA Phenotyping the Parents of an Alleged Father," Texas Medicine, 79(11), 1983, November, pp. 54-57.

As to the due process requirement regarding notice, as in any other civil proceeding, Petitioner is required to be properly served with notice that a support complaint has been filed on behalf of a minor child to whom duty of support is owing. 42 Pa.C.S.A. §6704. This notice contains the support complaint and an order directing the putative father to appear for a domestic relations conference before a domestic relations hearing officer. The putative father either acknowledges or denies paternity of the child at the hearing. If the putative father denies paternity, the conference is terminated and the

putative father is given notice of his right to a trial with or without a jury. Pennsylvania Rules of Civil Procedure, Rule 1910.15. The putative father is permitted pre-trial discovery by special order of the court. Pennsylvania Rules of Civil Procedure 1910.9. Petitioner is also granted the full panoply of post-trial rights, as is evidenced by the present appellate position of this case. Pennsylvania Rules of Civil Procedure 1910.15(c-f). Once post-trial issues are resolved in favor of the child the doctrine of res judicata applies in order to protect the best interests of the child. Commonwealth ex rel. Nedzwecky v. Nedzwecky, 203 Pa. Super. 179, 199 A.2d 490 (1964).

Petitioner has been afforded a panoply of due process protections and still clamors for more. Clearly, his total disinterest in his child does not require more constitutional protection than it is

already afforded. For Petitioner to claim that he is entitled to a stricter burden of proof in addition to all the existing procedural safeguards is so unfair as to offend our system's basic sense of justice. The very language of the clear and convincing standard could well deprive the child of a fair chance to prove parentage.

The clear and convincing standard states "The witness must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. "In re estate Fichert v. Lord, 461 Pa. 653 (1975).

The intermediate standard usually uses some combination of the words clear, cogent, unequivocal and convincing. It is

typically used in civil proceedings where the interests are more substantial than money, i.e. where one risks having a reputation tarnished; to protect one from unusually drastic consequences, such as the termination of already established parent/child relationship, deportation, denaturalization and involuntary commitment to a mental institution. Addington v. Texas, 441 U.S. 424 (1979).

An analysis of the language shows that the clear and convincing standard is much closer to the beyond a reasonable doubt standard. The language of the clear and convincing standard clearly presents the child with a burden so unequal, in that it is so much weightier than the father's, that it becomes an invidious barrier and a form of discrimination in itself. This discrimination is prohibited by Gomez v. Perez, 409 U.S. 535 (1973). A higher standard would stand for societal punishment of the child for being

born out-of-wedlock.

In fact, in a paternity jury trial in which the clear and convincing standard was used, following the Court of Common Pleas opinion, the child lost the case, in spite of a 99.44 percent probability of paternity result on a human leukocyte antigen blood test.

One of the functions of the standard of proof is to tell the fact finder how society wishes the risk of error to be distributed between litigants. Addington v. Texas, 441 U.S. 418 (1979). A higher burden of proof placed on the innocent child would stand for society's judgment that the child should be punished for being born out-of-wedlock. Clearly, this result would be illogical and unjust.

CONCLUSION

For the reasons stated, the Supreme Court of Pennsylvania's decision should be affirmed.

Respectfully submitted,

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APPENDIX A_

42 Pa.C.S.A 6704(g)

Commencement Of Support Actions

(g) Trial Of Paternity -- Where the paternity of a child born out-of-wedlock is disputed, the determination of paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not a trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. The burden of proof shall be by a preponderance of the evidence.

APPENDIX B

42 Pa.C.S.A. 6708(a)

Enforcement Of Support Orders

(a) General Rule -- A defendant who willfully fails to comply with any order under this subchapter, except an order subject to section 6705 (relating to failure of defendant to appear), may, after hearing, be adjudged in contempt and committed to prison by the court.

APPENDIX C

42 Pa.C.S.A. 6133

Authority For Test

In any matter subject to this subchapter in which paternity, parentage or identity of a child is a relevant fact, the court upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity, parentage or identity of a child against such party, or enforce its order if the rights of others and the interests of justice so require.

APPENDIX D

42 Pa.C.S.A. 6711

Duties Of District Attorney

(a) General Rule -- The district attorney shall at all times aid in the enforcement of the duty of support and shall cooperate with the domestic relations section in the presentation of complaints or in any proceeding designed to obtain compliance with any order of the court.

(b) Representation Of Complainant -- The district attorney, upon the request of the court or a Commonwealth or local public welfare official, shall represent any complainant in any proceeding under this subchapter.

APPENDIX E

Pa.R.Civil Proc. 1910.15(a-f)

Rule 1910.15 Paternity

(a) If the action seeks support for a child born out-of-wedlock and the reputed father is named as defendant, the defendant may acknowledge paternity in a verified writing substantially in the form provided by Rule 1910.28(a). In that event the action shall proceed as in other actions for support.

(b) If the reputed father does not execute an acknowledgment of paternity, the domestic relations officer shall terminate the conference. He shall advise the parties that there will be a trial without jury on the issue of paternity unless within ten days after the conference either party demands a trial by jury as provided by Rule 1910.28(b).

Note: See Section 6131 of the Judicial Code, 42 Pa.C.S. §6131 et seq., for the Uniform Act on Blood Tests to Determine Paternity.

(c) Post-trial proceedings shall be governed by Rules 227.1 to 227.4 inclusive and shall be limited to the issue of paternity.

(d)(1) If the verdict or decision is for the defendant on the issue of paternity, unless a post-trial motion is filed and sustained, a final order shall be entered, on praecipe or by the court, dismissing the action as to the child; or

(2) If the verdict or decision is against the defendant on the issue of paternity, unless a post-trial motion is filed and sustained, an interlocutory order shall be entered, on praecipe or by the court, finding paternity.

(e) After an interlocutory order is entered finding that the defendant is the father of the child, the court shall either refer the case to a conference as in other actions for support or as expeditiously as possible

hold a hearing on the issue of the amount of support and shall enter a final order of support.

(f) The interlocutory order of paternity is not an appealable order but any issue of paternity raised in a post-trial motion may be included in an appeal from a final order of support.

No. 86-98

In the Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY L. RIVERA

Appellant,

v.

JEAN MARIE MINNICH

Appellee.

On Appeal from the Supreme Court of Pennsylvania

BRIEF AMICUS CURIAE OF THE STATE OF OREGON IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

Amicus State of Oregon has filiation procedures similar in some respects to those of Pennsylvania. For purposes of this case, most important among those procedures is Oregon's requirement, like Pennsylvania's, that paternity be established by a preponderance of the evidence. Or. Rev. Stat. § 109.155(2) (1985). Oregon appears in this case in order to defend the balance struck by its state legislature, a balance which accommodates the interests at stake in a way that is both fair and constitutional.

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SUMMARY OF ARGUMENT

Contrary to appellant's argument, the Due Process Clause does not mandate a "clear and convincing" standard of proof in filiation proceedings. Appellant's argument rests in large part on the assertion that filiation is "simply the reverse" of termination of parental rights for constitutional purposes. This attempted equation is flawed because the interests involved in the two types of proceedings are fundamentally different. Appellant's asserted interests all reduce to economics: he seeks to avoid the financial burden the mother seeks to impose. The mother's interest in obtaining financial assistance in caring for her child is similarly economic in nature. The child's interest, like the mother's, is in obtaining support from the father. Thus, in a filiation proceeding, the interests on both sides of the litigation are financial. They therefore are of equal constitutional significance, and any justification for a heightened standard of proof evaporates.

The mandate for placing a greater burden on one party stems from the recognition that the other party has a constitutionally protected interest of greater import at stake. For example, in a criminal trial or involuntary mental commitment proceeding, the defendant's physical liberty is at stake. In a termination proceeding the parents' familial liberty is at risk. In these examples, the government acts in its sovereign capacity to withdraw or withhold liberty. An erroneous "deprivation" only occurs when the state prevails in a case it should lose. Due process mandates an elevated standard of proof in order to reduce the risk of an erroneous deprivation. The higher standard of proof does not reduce the risk of error in the factfinding process; it merely tilts the risk of error away from the individual. In order to provide the individual greater protection from erroneous government

interference with constitutional liberty, the government must bear a greater share of the risk of error.

Unlike criminal prosecutions, civil commitment proceedings or termination cases, a filiation proceeding such as the present case is not a unilateral attempt by the government to withdraw constitutional liberty. In a filiation proceeding individual interests are at stake on both sides of the litigation. The interests of the private litigants are of equal or approximately equal significance. An erroneous victory for either party necessarily results in an erroneous interference with the losing party's interests. To elevate the standard of proof in cases with competing individual interests of equal weight on each side of the proceeding would unjustifiably favor one party over the other. Rather than mandating an elevated standard of proof, due process might well mandate a standard that avoids such essentially arbitrary favoritism. At a minimum, states are not constitutionally foreclosed from providing dispute resolution mechanisms that treat the interests of all parties in a filiation proceeding equally and which evenly apportion the risk of error.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment commands that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." In *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court invoked the familiar three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976),[1] to conclude that, in parental rights termination proceedings, due process mandates the heightened "clear and convincing" standard of proof. Application of the *Mathews* test to filiation proceedings demonstrates that due process does not require and may prohibit imposition of this elevated standard.[2]

[1] [I]dentification of the specific dictates of due process generally requires consideraton of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

I. The Private Interests.

A. The putative father's interests are purely economic and do not implicate the familial rights at stake in *Santosky*.

Appellant's assertion that paternity proceedings are "simply the reverse of the termination of parental rights proceedings considered in *Santosky*," (App. Br. 12), is insupportable. Termination of parental rights works "a unique kind of deprivation." *Santosky*, *supra*, 455 U.S. at 759, quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). The "deprivation" that results from a finding of paternity does not implicate the constellation of constitutionally protected familial values at stake in terminations. Rather, the putative father's interests are purely economic.

This Court recently has noted the difference between the constitutional significance of a mere biological link and the greater weight given to a fully developed familial relationship. In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court considered a challenge to a New York statutory scheme that permitted the adoption of illegitimate children without notice

[2] Our analysis is based on the situation presented by this and the majority of filiation proceedings, where the mother, either independently or with the assistance of the state, sues the putative father asserting that he is the father of her child. In addition to suits brought by the mother, however, Oregon law permits filiation proceedings to be filed, *inter alia*, by the child, or by a man claiming to be the father of a child born out of wedlock or of an unborn child who may be born out of wedlock. Or. Rev. Stat. § 109.125(1) (1985)

to putative fathers who had not taken steps either to exercise parental rights or to accept parental responsibilities. The Court stressed the linkage between right and duty, and went on to emphasize the importance of love and emotional attachments in the creation of constitutionally protected familial rights. 463 U.S. at 257-61.

> The difference between the developed parent-child relationship that was implicated in *Stanley* [*v. Illinois*, 405 U.S. 645 (1972)] and *Caban* [*v. Mohammed*, 441 U.S. 380 (1979)], and the potential relationship involved in *Quilloin* [*v. Walcott*, 434 U.S. 246 (1978)] and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." . . . But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."

463 U.S. at 261 (citations and footnote omitted).

As the Court's statement suggests, fully developed familial relationships involving the assumption of parental duties and mutual love and affection are entitled to a significantly greater level of due process protection than the inchoate relationship at issue in this case. Appellant's assertion that his interests are equal to those of a parent facing termination is, thus, incorrect as a general proposition. His more specific propositions are no more persuasive.

Despite his attempts to suggest that he has a multiplicity of interests at stake (App. Br. 7-10), the putative father's

constitutionally cognizable interest in a paternity proceeding is limited to property: his funds will be chargeable for the child's benefit. It is undoubtedly true that the support obligation that will flow from an adjudication of paternity, including provision of medical care, wage garnishment, et cetera, can be substantial. The same, of course, may be said for the judgment following a determination of negligence in an ordinary tort action. The magnitude of the financial liability simply does not govern the standard of proof.

Appellant also asserts that the child may have rights against his estate through the laws of intestacy. In Oregon, as in all states except Louisiana, a parent may avoid this possibility by the simple expedient of writing a will and expressly disinheriting any child. *See Sieben v. Richards*, 8 Or. App. 487, 494 P.2d 253 (1972); *see generally* J. Dukeminier and S. Johanson FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING 555-56 (1972) (in all states except Louisiana there is no statutory protection against disinheritance). The appellant is attempting to increase the weight of his property interest by suggesting that he is entitled to constitutional protection against his own future lack of planning.

Appellant also relies on the potential deprivation of liberty that could result from imprisonment for non-payment of his support obligation. (App. Br. 8-9). That interest is derivative only: it only arises in the event that the father-elect fails without cause to meet his economic obligations. In Oregon, as in Pennsylvania, *see* 23 Pa. Cons. Stat. Ann. § 4345 (1986), an adjudication of contempt requires wilful disobediance of a court order. *See State ex rel. Oregon State Bar v. Wright*, 280 Or. 713, 573 P.2d 294 (1977). Similarly, criminal non-support requires refusal or neglect to support "without lawful excuse." Or. Rev. Stat. § 163.555(1) (1985). Financial inability to pay support that is not of a defendant's own

making is a lawful excuse. *See State v. Timmons*, 75 Or. App. 678, 706 P.2d 1018, *rev. denied*, 300 Or. 451, 712 P.2d 110 (1985). Thus, the possibility of incarceration is real only if appellant defies the court's order without justification. His future irresponsibility, and its legitimate consequences, should not be a valid reason for granting him enhanced constitutional protection.

B. The mother's interests are entitled to the same level of constitutional protection as the father's.

The plaintiff-mother's interests, like the putative father's, are primarily economic. She seeks financial assistance in caring for her child. That assistance can take the form of monthly support payments, medical insurance and such other support as state law may provide.[3]

Even in those cases where the state brings the filiation proceeding on the mother's behalf for the purposes of recouping public assistance paid to the child, the mother's interest remains substantial. The average time that a mother receives Aid to Dependent Children is brief, leaving the father-elect as a direct resource to the mother and child for many years.[4]

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[3] Or. Rev. Stat. § 109.155(4) (1985) provides that after a determination of paternity:

> The court shall have the power to order either parent to pay such sum as it deems appropriate for the past and future support and maintenance of the child during its minority and while the child is attending school and the reasonable and necessary expenses incurred or to be incurred in connection with prenatal care, expenses attendant with the birth and postnatal care. The court may grant the prevailing party reasonable costs of suit, and reasonable attorney fees at trial and on appeal.

Or. Rev. Stat. § 109.010 (1985) provides, in pertinent part:

> Parents are bound to maintain their children who are poor and unable to work to maintain themselves . . . .

[4] Studies conducted for the Department of Health and Human Services confirm that the average family receives Aid to Dependent Children for less than two years. *See* Oberheu, Howard, "Time On Assistance," H.H.S. Staff

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The mother's interest is, in effect, the mirror image of the father's. Every dollar that he contributes to the cost of child raising is a dollar not otherwise available to the mother or child. The father's liberty is at risk if he fails to support the child to the extent of his capability because he may be found to be in contempt or guilty of criminal non-support; but so, too, is the mother's liberty at risk, for she also is subject to the statutory obligation to support the child. A finding of paternity is final and may not be relitigated; but so, too, by operation of *res judicata*, is a finding of non-paternity.[5]

The plaintiff mother is in the same position as any other civil litigant: if the defendant is the biological father of her child she is entitled, as a matter of state law, to receive his contributory assistance in defraying the substantial economic costs of raising their child. Her rights are no less substantial than his and entitled to no less protection.

C. Raising the standard of proof increases the likelihood of an erroneous deprivation of the child's interest in gaining a source of support.

The child's primary interest is in obtaining support from the father. Children obviously are not well served by erroneous findings of non-paternity, which deprive them not

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Report, February, 1982, S.S.A. Publication No. 13-11979 (of 411,000 A.D.C. families whose grants were opened January through March of 1976, only 41.7 percent continuously received benefits through March 1977); Bane and Ellwood, "The Dynamics of Dependence: The Routes to Self-Sufficiency," published by Urban Systems Research and Engineering, Inc., under H.H.S. contract No. HHS-100-82-0038, June 1983 (of 676 A.D.C. families who received grants of at least $250 per month and were followed from 1968 through 1979, one-half received A.D.C. less than two years, two-thirds were off A.D.C. within four years and only seventeen percent remained on assistance for eight years.)

[5] *See Fox v. Hohenshelt*, 19 Or. App. 617, 528 P.2d 1376 (1974) (filiation proceedings are suits in equity); and *Wagner v. Savage, as Adm'r*, 195 Or. 128, 147, 244 P.2d 161 (1952) (principles of *res judicata* apply to suits in equity).

only of support, but also of the opportunity to know their heritage. Arguably, an erroneous finding of paternity, while providing a source of support, may be undesirable to the child for psychological reasons. There is, however, no principled basis for contending that the child is better served by decreasing the risk of erroneous findings of paternity at the cost of increasing the risk of erroneous findings of non-paternity.[6]

Because a heightened standard of proof increases the risk of erroneous findings of non-paternity at the child's expense, consideration of the child's interests militates strongly against the clear and convincing standard.

II. The Risk of Error.

Two potential errors that might occur in any given judicial proceeding should be distinguished. The first is the risk of an erroneous decision; the second is the risk of an erroneous deprivation. An erroneous decision occurs whenever the fact-finding process fails. When an innocent defendant is convicted, when a guilty defendant goes free or when a meritorious defense is rejected by a jury, there is an erroneous decision. A mistake is made. *See In re Winship*, 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring). In the due process context, however, an erroneous *deprivation* occurs only when an erroneous decision impairs a constitutionally protected interest in life, liberty or property.

In a termination of parental rights case, only one party, the parent, has a constitutionally protected interest at stake. *Santosky v. Kramer*, *supra*, 455 U.S. at 759-61, 765. The state, acting in its sovereign capacity, seeks to deprive the individual of that interest. Similarly, in a criminal prosecution, the only constitutionally protected interest at risk is the defendant's liberty. In both contexts, the state may

[6] In fact, it is reasonable to assert that the child is better served by an erroneous finding of paternity than an erroneous finding of non-paternity. The former at least provides a potential source of financial support.

have compelling reasons for acting, but the character of the proceeding is essentially unilateral. The government acts against an individual. An erroneous deprivation results only when an innocent defendant is convicted or a fit parent's rights are terminated. Acquittals of guilty defendants or failures to terminate the rights of unfit parents, on the other hand, although plainly "erroneous" decisions with undesirable social consequences, do not result in erroneous deprivations of interests protected by the Due Process Clause.

Because a criminal conviction or a parental rights termination works a unique and grievous form of deprivation to the defendant, due process mandates an elevated standard of proof. The state must assume a greater share of the risk of an *erroneous decision* in order to reduce the risk of an *erroneous deprivation*. *See Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

However, when litigation involves competing private interests of equal or approximately equal weight, a higher standard of proof serves no useful constitutional purpose. Any advantage accorded to one party by changing the standard of proof necessarily imposes a corresponding disadvantage on the other party. For example, in a civi' action for money damages, a wrongful verdict for either private party results in the erroneous deprivation of the other party's property. Because the litigants' interests are of equal weight in the constitutional scales—both risk only property—the risk of error properly is distributed in a "roughly equal fashion." *Santosky v. Kramer*, *supra*, 455 U.S. at 755, quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979).[7]

[7] It is the nature of the interest, not its significance to the individual plaintiff or defendant, that is germane. Thus, the standard of proof will not vary because one civil defendant can and another cannot afford the financial consequences of losing. *See Santosky v. Kramer*, *supra*, 455 U.S. at 757 (standard of proof must be based on the generality of cases, not on case-by-case exceptions).

As discussed above, in a filiation proceeding a finding of paternity results in a deprivation of the putative father's property. A finding of non-paternity works a virtually identical deprivation of the mother and child's interest in receiving support. While elevating the standard of proof likely would reduce the number of instances in which a putative father erroneously would be found to be the father and hence reduce the risk of erroneous deprivations of the father's property, it would increase the number of instances in which the actual father would escape responsibility, thus increasing the risk of erroneous deprivations of the mother's interest in the receipt of support. Justice Harlan made our point:

> In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
>
> The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderence of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

In re Winship, *supra*, 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring).[8] *See also Santosky v. Kramer*, *supra*, 455 U.S.

[8] This discussion was described by Justice Harlan as a "corollary" of his

(Footnote continued on next page)

785-791 (Rehnquist, J., dissenting).

In filiation proceedings the comparative social disutility of erroneous decisions is in relative equipoise. Because there is no rational basis for preferring the putative father's rights over those of the mother and child, a heightened burden of proof creates an unjustified inequality in the risk of error. Due process does not mandate inequality in the burden of proof in addition to the inequality the plaintiff-mother faces in her need to preponderate.[9]

III. The State's Interests.

In prior cases where this Court has considered standards of proof, government has been a direct adversary to an individual citizen whose constitutionally protected interests were at risk. In filiation cases the state either stands in the shoes of the mother, seeking to assert her property interest or, in cases brought directly by the mother, plays a more neutral role. In either situation, however, the state's chief interest lies in providing a fair mechanism for resolving disputes of fact in which interested individuals share equally in the risk of error.

Appellant asserts that the mother and the state have no interest in an erroneous determination of paternity. (App. Br. 13). This assertion incorrectly ignores the interest, shared by the mother, child and state, in avoiding incorrect findings of non-paternity—an interest that would be impaired by the elevated standard the appellant urges. While it would be

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often-cited statement that the function of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, *supra*, 397 U.S. at 370.

[9] It goes without saying that the risk of error in filiation proceedings is substantially reduced in comparison with termination cases by the nature of the evidence. As this Court noted in *Santosky*, the evidence relied on in terminations is imprecise and subjective. 455 U.S. at 762. In filiation proceedings, by contrast, blood test evidence is objective and highly reliable. *See Little v. Streater*, 452 U.S. 1, 6 *et seq.* (1981).

naive to suggest that many litigants do not desire an erroneous decision that works to their benefit, no one can assert a legitimate or constitutionally protected interest in an erroneous result. This is as true of private litigants, whatever the interest at stake, as it is of the state. Thus, it adds nothing to the analysis to assert that the state has no interest in an erroneous determination of paternity. The state has equally little interest in an erroneous determination of non-paternity. The putative father, also, cannot assert a legitimate interest in an erroneous verdict of non-paternity.

In *Santosky* the Court noted that it would be incorrect to presume at the factfinding stage of a parental termination case that the parents and the child are adversaries. The Court went on to state:

> [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

455 U.S. at 760-61 (footnote omitted).

It is not accurate to describe an elevated standard of proof as an "error-reducing" procedure. As discussed above, an elevated standard of proof does not reduce the risk of error, it merely shifts it from one side to the other. A heightened burden of proof, while decreasing erroneous determinations of paternity, inevitably would increase the number of erroneous determinations of non-paternity. The state's legitimate interest in providing a fair mechanism for resolving disputes can be realized only by an equal distribution of the risk of error. A preponderance standard best accomplishes that result. *See Addington v. Texas*, 441 U.S. 418, 423 (1979).

CONCLUSION

Application of the *Mathews v. Eldridge* criteria in light of all of the relevant private interests at stake demonstrates that

a clear and convincing standard does not decrease the overall risk of erroneous deprivation of those interests in filiation proceedings. Accordingly, the decision of the Supreme Court of Pennsylvania upholding the constitutionality of the preponderance standard of proof should be affirmed.

Respectfully submitted,

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No. 86-98

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

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Appellant

v.

JEAN MARIE MINNICH,
Appellee.

On Appeal from the Supreme
Court of Pennsylvania

BRIEF FOR THE PEOPLE OF THE STATES OF CALIFORNIA, FLORIDA, ILLINOIS, KANSAS, MICHIGAN, MINNESOTA, MONTANA, NEVADA, SOUTH DAKOTA, TENNESSEE; THE APPELLATE COMMITTEE OF THE CALIFORNIA FAMILY SUPPORT COUNCIL, AND THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION AS AMICI CURIAE

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QUESTION PRESENTED

Does the law of the State of Pennsylvania which, consistent with the law of at least 40 states permitting paternity to be established by the

preponderance of the evidence, violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

INTEREST OF AMICI CURIAE

This case presents a significant issue regarding the standard of proof to be applied in actions to establish paternity. The vast majority of states, whether by statutory or case law, rely on a standard of preponderance of the evidence. Appellant seeks to require a standard of clear and convincing evidence, which is relatively uncommon in civil cases.

The issue of establishment of paternity is a matter of great public concern. The rate of out-of-wedlock births has increased dramatically in the United States. In 1960 only 5 percent of

births were out of wedlock; by 1981 the number had increased to 19 percent. (Click, "American Household Structure in Transition," Family Planning Perspectives (Sept/Oct 1984) p. 206.) Nonmarital births have serious repercussions for the children born out of wedlock, for their mothers and for the taxpayers.

Harry D. Krause, a professor of law at the University of Illinois, wrote in Child Support in America, The Legal Perspective (1981):

> "All abandoned children are in the same straits regarding their need for support and to locate an absent parent. The child of unmarried parents, however, struggles against the further obstacle of uncertain paternity and a long (though fortunately nearly lost) tradition of legal discrimination. Within the context of the child support enforcement problem, special emphasis thus must be placed upon those children who, in addition to locating their father and making him pay, must first identify him legally." (Id., at p. 103.)

A child whose paternity is established is in a position to receive numerous benefits including access to entitlement programs (e.g., Social Security, veteran's benefits) and receipt of child support.

Out-of-wedlock births seriously impact on the mothers of the children. Teenagers account for more than half of all nonmarital births in the United States. (U.S. Department of Health and Human Services, National Center for Health Statistics, Vital Statistics of the United States, published in Statistical Abstract of the United States (1981), p. 65.) Many of these mothers do not complete high school and lack marketable skills. Typically, they enter a pattern of unemployment, poverty, welfare dependency and repeated pregnancies. (U.S. Department of

Commerce, Bureau of the Census, Marital Status and Living Arrangements.)

Finally, there is the impact on taxpayers. It is estimated that 60 percent of the children born out of wedlock who are not adopted receive welfare. (U. S. Report of the Census, Child Support and Alimony; Current Population Reports, Rept. 112; U.S. Bureau of the Census.) The realization that the public is carrying a weighty financial burden which ought to be assumed by parents resulted in enactment of strong child support enforcement legislation at the federal level and enhanced child support enforcement activities by the states.

The People of the states filing this brief have a significant responsibility in protecting the interest of children born out of wedlock, the rights of their

mothers in obtaining equitable support from their fathers, and the concerns of the taxpayers in the preservation of public treasuries from making payments which should be made by persons responsible for the support of their own children.

Appellant's position, should it prevail, would make it more difficult for the states to carry out their responsibility in the establishment of paternity by imposing a higher, and less clear, burden of proof. The interest of alleged fathers should not be permitted to outweigh the vital interest of children, mothers and the public. This would be the result if a standard greater than a preponderance of the evidence were required.

ARGUMENT

THE STANDARD OF PROOF OF A PREPONDERANCE OF THE EVIDENCE IN ACTIONS TO ESTABLISH PATERNITY DOES NOT IMPAIR THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION

Pennsylvania, as well as the vast majority of states, provides that the establishment of paternity is a civil proceeding. This is in conformity with the Uniform Parentage Act, which provides, in pertinent part, that an action brought under its purview "is a civil action governed by the rules of civil procedure." (Uniform Parentage Act, § 14.) The standard of proof in most civil actions is the preponderance of evidence test.

A preponderance of the evidence test for actions to establish paternity comports with the Due Process clause of the Fourteenth Amendment. In Addington

v. Texas 441 U.S. 418, 423 (1979), this Court noted that the purpose of a standard of proof, as embodied in the Due Process Clause, is to "'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of action.'" (Quoting In re Winship 397 U.S. 358 (1970),concurring opinion of Harlan, J., at 370.) In Mathews v. Eldridge 424 U.S. 319 (1976), this Court, in analyzing whether due process requirements mandated pre-termination hearings in regards to Social Security disability payments, considered: 1) the private interest that would be affected by the official action; 2) the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural

safeguards; and 3) the governmental interest, including the function involved and the fiscal and administrative burden that the additional or substitute requirements would entail. This Court has utilized these factors in considering the due process requirements for the burden of proof in involuntary commitment proceedings (Addington v. Texas, supra, 441 U.S. 418); the right to appointed counsel in actions for the termination of parental rights (Lassiter v. Department of Social Services 452 U.S. 18, 27 (1981); the burden of proof required for the termination of parental rights (Santosky v. Kramer 455 U.S. 745, 754 (1982); and allocation of blood test costs in paternity actions (Little v. Streater 452 U.S. 1, 13 (1980). A similar analysis is applicable to the issue raised herein.

A. The Private Interests Affected

The private interests at stake are substantial; but they are substantial not only for alleged fathers, but also for the children and their mothers.

In Little v. Streater, supra, 452 U.S. at page 13, this Court held that the putative father had a pecuniary interest in avoiding substantial support obligations, a liberty interest which could be threatened by possible sanctions for noncompliance, and an interest in the creation of the parent-child relationship. However, these interests were defined in the context of whether an indigent defendant in a paternity action should be required to forgo blood tests due to his inability to pay for such tests.

A substantial interest of a putative father in a paternity action is to avoid

the financial obligations which result from a determination he is the father of the child. This is not different from most other civil actions, where the defendant has a strong desire not to become liable to the plaintiff for a large sum of money. Due process requires no more than a preponderance test in those actions. (Addington v. Texas, supra, 441 U.S. at 423.)

The threat of loss of liberty is more problematical. Effective June 27, 1978, the Pennsylvania Civil Procedure Support Law abolished the right to a criminal proceeding on the issue of paternity. (Act No. 1978-46, P.L. 106.)

A determination of paternity does not place a defendant's liberty at peril. That would require a subsequent intervening act: the willful refusal to pay a support order by a person with the

financial ability to pay. A father with a limited ability to pay support can have his obligation adjusted to fit his ability (Uniform Parentage Act § 15(e)), and even in the absence of ability to pay, the child may gain access to entitlement payments.

Moreover, any number of orders arising in civil cases, such as injunctive orders, may be established by a preponderance of evidence even though violation may result in the loss of liberty. Furthermore, in analyzing the private interests affected, the interest of the child and the mother must be considered. In Santosky v. Kramer, supra, 455 U.S. at p. 745, it was held:

> ". . .in any given proceeding, the minimum standard of proof tolerated by due process requirements reflect not only the weight of the private and public interests affected but

> also a societal judgment about how the risk of error should be distributed between the litigants."

In a paternity proceeding, unlike the parental rights termination considered in Santosky, the private interest of the child (and of the mother) is not parallel but in fact, adverse to, the interest of the defendant in the factual determination of paternity. The interest in maintaining a parent-child relationship has been deemed "a compelling one, ranked among the most basic of civil rights. (In re B.C. (1974) 11 Cal.3d 679, 688; 114 Cal.Rptr. 444, 456; see Stanley v. Illinois (1972) 405 U.S. 645, 651.)

The preponderance of evidence standard indicates society's conclusion that litigants should share the risk of error in roughly equal fashion. (Addington v. Texas, supra, 441 U.S. at

p. 423.) Where the interest of the child and of the mothe. are at least as great as the interest of the putative father, the risk of error should be shared in roughly equal fashion. This is not a situation, such as in Addington, where the risk of error to the defendant is significantly greater than any possible harm to the adverse party.

Moreover, it must be noted that the state is not involved in all paternity actions. The effect of increasing the burden of proof to clear and convincing evidence would impact on plaintiffs including mothers and children not represented by public entities whose interest in justice should not be diminished in favor of an alleged father's interest. A test of preponderence of the evidence provides for an equal sharing of the risk.

B. Risk of Erroneous Deprivation

The risk of erroneous deprivation as the result of a burden of proof of the preponderance of the evidence has been substantially minimized by both scientific and procedural advances. Moreover, such erroneous determinations as do occur would not be prevented by the imposition of a standard of clear and convincing evidence.

In a concurring opinion in Mills v. Habluetzel 456 U.S. 91 (1982), Justice O'Connor noted that "recent scientific developments in blood testing dramatically reduce the possibility that a defendant will be falsely accused of being the illegitimate child's father." (Id., at 104, fn. 2.) Indeed, in the overwhelming majority of cases, scientific evidence is available which drastically reduces the risk of error in

any paternity proceeding. The evidence is available to be used as probative evidence of paternity in an overwhelming majority of states including Pennsylvania. That blood tests as evidence of probability of paternity has achieved almost universal acceptance is illustrated by the fact that courts in 34 states and the District of Columbia have upheld the affirmative use of paternity tests: State of Arizona v. Bravo (1984) 139 Ariz. 393, 678 P.2d 974; Bradley v. Houston (1984) 12 Ark.App.351, 676 SW 2d 746; Cramer v. Morrison (1974) 88 Cal.App.3d 873, 153 Cal.Rptr. 865; Moore v. McNamara (1986) 201 Conn. 16, 513 A.2d 660; Cutchember v. Payne (1983) 466 A.2d 1240, [District of Columbia]; Carlyon v. Weeks (Ct. App. 1980) [Florida]; 387 So.2d 465; Raines v. White (1981) 248 Ga.

406; 284 SE.2d 7; Crain v. Crain (1983) 104 Idaho 666; 662 P.2d 530; People v. Alzoubi (1985) 133 Ill.App.3d 806, 479 NE.2d 1208; Davis v. State (Ct. App. 1985) 476 N.E.2d 127 [Indiana]; State of Iowa v. Vinsand (Sup. Ct. 1982) 318 N.W.2d 208; Tice v. Richardson (1982) 7 Kan.App.2d 509, 644 P.2d 490; Bartlett v. Commonwealth of Kentucky (Sup.Ct. 1986) 705 S.W.2d 470; State Through Department of Health v. Smith (Ct. App. 1984) 459 S.2d 146 [Louisiana]; State of Maine v. Thompson (Sup.Ct. 1986) 503 A.2d 689; Haines v. Shanholtz (1984) 57 Md.App.92, 468 A.2d 1365; Commonwealth v. Beausoleil (1986) 397 Mass. 206, 490 N.E.2d 788; Pizana v. Jones (1983) 127 Mich.App. 123, 339 N.W.2d 1; Hennepin County Welfare Board v. Ayers (Sup.Ct. 1981) 304 N.W.2d 879 [Minnesota];

Imms v. Clarke (Mo.App. 1983) 654 S.W.2d 281; J.H. v. M.H. (1980) 177 N.J. Super.436, 426 A.2d 1073; State of New Mexico v. Coleman (July 29, 1986) 723 P.2d 971; Bowling v. Coney (1983) 91 A.D.2d 1195, 459 NY.2d 183 [New York]; Cole v. Cole (1985) 74 N.C.App. 247 328 S.E.2d 446; State v. Unterseher (Sup.Ct. 1977) 255 N.W.2d 882 [North Dakota]; Owens v. Bell (1983) 6 Ohio St.3d 46, 451 N.E.2d 241; Callison v. Callison (Sup.Ct. 1984) 687 P.2d 106; Plemel and State of Oregon v. Walter (1986) 80 Or.App. 250, 721 P.2d 474; Turek v. Hardy (1983) 312 Pa. Super. 158, 458 A.2d 562; Corley v. Rowe (1984) 280 S.C. 338, 12 S.E.2d 720; Biley v. Williams (July 8, 1986) __ S.W.2d__ [Tennessee]; In re E.G.M. (Ct.App. 1983) 647 S.W.2d 74; Phillips v. Jackson (Sup.Ct. 1980) 615 P.2d 1228 [Utah];

Hankerson v. Moody (1985) 229 Va. 270, 329 S.E.2d 791; State of Washington v. James (1984) 38 Wash.App. 264, 686 P.2d 1097.

In addition, 12 other states have statutes providing for the admissibility of blood test evidence:

Alabama -- Ala. Code 26-17-12;

Colorado -- C.R.S. 13-25-126;

Delaware -- Del. Code Title 13, § 811;

Hawaii -- H.R.S. § 584-12;

Montana -- M.C.A. § 40-6-113;

Nevada -- N.R.S. 126.131;

New Hampshire -- RSA § 522:4;

Rhode Island -- Gen.L. § 15-8-11;

Vermont -- Vt. Stats. Title 15 § 304;

West Virginia -- W.Va. Code 48A-6-3

Wisconsin -- W.S.A. §§ 767.47 (1)(d) 767.48; 885.23;

Wyoming -- Wyo. Stats. § 14-2-110.

State courts across the country have held, following Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) that inclusionary blood test results, and the statistical probabilities drawn therefrom, are admissible in paternity litigation. Indeed, the Supreme Judicial Court of Massachusetts, while noting that "[t]he admission of evidence of statistical probability is disfavored in this Commonwealth," Commonwealth v. Beausoliel, 397 Mass. 206, 490 N.E.2d 788, 795 n. 15, also commented in holding HLA results to be admissible, "those courts in other jurisdictions that have determined the admissibility of inculpatory HLA test results by reference to Frye have concluded unanimously that such evidence is generally accepted as reliable in the scientific community."

490 N.E.2d at 794 (footnote omitted; emphasis added).

Thus, in modern paternity litigation, with the scientific procedures available, the risk of an erroneous determination is extremely small despite the nature of the nonmedical evidence. (See Joint AMA-ABA Guidelines: Present Status of Serological Testing, 10 Family L.Q. 247 (1976).)

Additionally, there is an increasing tendency to require the appointment of counsel for indigent defendants in paternity actions where the state appears as a party or on behalf of the mother or child: Alaska (Reynolds v. Kimmons (1977) 569 P.2d 799), 154 Cal.Rptr. 524; California (Salas v. Cortez (1979) 24 Cal.3d 22 154 Cal.Rptr 529, cert den. 444 U.S. 900); Indiana (Kennedy v. Wood (1982 Ind. App.) 439 N.E.2d 1367);

Michigan (Artibee v. Cheboygan Circuit Judge (1976) 397 Mich. 54, 243 N.W.2d 248); Minnesota (Hepfel v. Bashaw (1979) 279 N.W. 342); New Jersey (T. v. S. (1979) 169 N.J. Super. 209, 404 A.2d 653; New York (B. v. D. (1979) 99 Misc.2d 1085, 418 N.Y.S.2d 271); and the Uniform Parentage Act, section 19.

The combination of procedural and scientific advances to an accused father substantially minimize the risk of an erroneous determination. As this Court observed in Addington v. Texas, supra, 441 U.S. at pages 417-418:

> "Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests [preponderance, clear and convincing and beyond a reasonable doubt] . . . may well be largely an academic exercise; there are no directly relevant empirical studies. . . . We probably can assume no more than that the difference between a preponderance of the evidence

> and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence." (Fn. omitted.)

Thus, the probable gain from appellant's proposed change in the burden of proof would be an increase in confusion rather than a decrease in erroneous determinations of paternity.

C. The Governmental Interest

The states have a valid interest in the welfare of a child born out of wedlock and who is receiving public assistance, as well as in securing support for the child from those legally responsible. Additionally, it shares the interest of the child in an accurate and just determination of paternity. (Little v. Streater, supra, 452 U.S. at p. 14.) In enacting the Social Service Amendments of 1974 (Pub.L. 93-647), the Senate

Committee on Finance noted "a child born out-of-wedlock has the right to have its paternity ascertained in a fair and efficient manner [and] . . . the interest primarily at stake in the paternity action . . . is . . . that of the child." (Senate Rept. No. 93-1356 (1974) at p. 52.) Clearly, the governmental interest in promoting the best interest of the child is at stake.

The states also have a considerable interest in seeing that the rights of the mother to receive child support are vindicated. The receipt of child support is often the difference between an independent life and welfare dependency. In Addington v. Texas, supra, this Court found that the preponderance of evidence test was insufficient to uphold the due process rights of individuals faced with civil commitment. The Court

held the individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. (Id., at p. 427.) The instant situation is very different. There is the interest of the child in ascertaining its parent and obtaining the support to which it is entitled; there is the interest of the mother in receiving child support and avoiding welfare dependency; there is the interest of the states in protecting the rights of its citizens and defending the public coffers. The potential injury to the alleged father is certainly no greater than the potential injury to the child, the mother, and the states. Accordingly, a preponderance test is justified and does not violate the due

process clause of the Fourteenth Amendment.

CONCLUSION

What is at stake is not the defendant's loss of liberty, nor the uprooting of his family relationship, nor the loss of any vested right. The primary issue is one of civil relationship of a father to his child, to the child's mother, and to the governmental entity which may be supporting both. A preponderance test is not only justified, but any other test may be improper:

> "Since the establishment of the child's civil relationship with its father is involved, serious doubts must be expressed as to the constitutionality of . . . those civil paternity statutes that raise the requirement of proof to a level higher than that required for other civil actions." (Krause, supra, Child Support in America, at pp. 190-191, emphasis in Text, fn. omitted.)

The decision of the Pennsylvania Supreme Court below properly allocates the burden of proof by requiring appellant's civil obligation be established by a preponderance of the evidence. Accordingly, the judgment of that court should be affirmed.

Dated: February 2, 1987

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No. 86-98

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

GREGORY L. RIVERA,
Appellant,

v.

JEAN MARIE MINNICH,
Appellee.

AFFIDAVIT OF MAILING AND CERTIFICATE OF SERVICE

M. HOWARD WAYNE, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On February 9, 1987, I deposited in the mailbox at 110 West A Street, San Diego, California, 92101, an envelope addressed to the Clerk of the Supreme Court of the United States, first-class postage prepaid, containing 40 copies of amici curiae brief in the above-entitled case.

I also certify that on February 9, 1987, 3 copies of amici curiae brief were mailed to each addressee named below:

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I further certify that all parties required to be served have been served.

M. Howard Wayne

M. HOWARD WAYNE

ATTESTATION BY NOTARY

State of California)
) ss:
County of San Diego)

On this 9th day of February 1987, before me Vida Allen, Notary Public, personally known to me to be the person whose name is subscribed to this instrument, and acknowledged that he executed it.

Vida M. Allen

Notary Public

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1990